Supreme Court, U.S.
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In The

Supreme Court of the United States

RONALD U. LURIE,

Petitioner,

versus

ROBERT J. BLACKWELL,
Liquidating Trustee of the
Popkin & Stern Liquidating Trust,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether petitioner has been deprived of property without due process of law as guaranteed by the Fifth Amendment to the United States Constitution when a Liquidating Trustee in bankruptcy levies against property owned by the petitioner to satisfy a deficiency judgment obtained pursuant to 11 U.S.C. §723(a) without first determining whether such a deficiency still exists at the time of the levy, when that judgment is based entirely on estimated damages that the Liquidating Trustee has an affirmative obligation to reduce as the allowed claims are reduced?

II. Whether petitioner has been deprived of property without due process of law as guaranteed by the Fifth Amendment to the United States Constitution when a Liquidating Trustee in bankruptcy adds post-judgment interest to a deficiency judgment obtained pursuant to 11 U.S.C. §723(a) without first determining whether such a deficiency exists at the time the interest was added, when that judgment is based entirely on estimated damages that the Liquidating Trustee has an affirmative obligation to reduce as the allowed claims are reduced?

III. Whether petitioner has been deprived of property without due process of law as guaranteed by the Fifth Amendments to the United States Constitution when a Liquidating Trustee in bankruptcy adds administrative costs and fees to a deficiency judgment obtained pursuant to 11 U.S.C. §723(a)?

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PETITION FOR A WRIT OF CERTIORARI

Ronald U. Lurie respectfully petitions this Court to review the decision of the United States Court of Appeals for the Eighth Circuit.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The opinion of the United States Court of Appeals for the Eighth Circuit is published at *In re: Popkin & Stern, Debtor, Robert J. Blackwell, Liquidating Trustee of the Popkin & Stern Liquidating Trust v. Ronald U. Lurie*, 346 F.3d 804 (8th Cir. 2003), and is reprinted here as Appendix A.

JURISDICTION

The Eighth Circuit Court of Appeals rendered its opinion on October 10, 2003. *See* Appendix A. On January 5, 2004, this Court granted a sixty day extension of time to file the petition for writ of certiorari, making this petition due on or before March 8, 2004. *See* Appendix C. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 11 U.S.C. §330, which provides, in pertinent part:

§330. Compensation of officers

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103 –

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

* * *

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for –

(i) unnecessary duplication of services; or

(ii) services that were not –

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

This case also involves 11 U.S.C. §503, which provides:

§503. Allowance of administrative expenses

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

(B) any tax –

(i) incurred by the estate, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by –

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the

cost of comparable services other than in a case under this title; and

(6) the fees and mileage payable under chapter 119 of title 28.

This case also involves 11 U.S.C. §723, which provides, in pertinent part:

§723. Rights of partnership trustee against general partners

(a) If there is a deficiency of property of the estate to pay in full all claims which are allowed in a case under this chapter concerning a partnership and with respect to which a general partner of the partnership is personally liable, the trustee shall have a claim against such general partner to the extent that under applicable nonbankruptcy law such general partner is personally liable for such deficiency.

This case also involves 28 U.S.C. §1961, which provides:

§1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment. The Director

of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at the underpayment rate or overpayment rate (whichever is appropriate) established under section 6621 of the Internal Revenue Code of 1986.

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal circuit, at the rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Court of Federal Claims only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

This case also involves the Fifth Amendment to the United States Constitution, which provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . .

U.S. CONST. amend. V.

STATEMENT OF THE CASE

Petitioner seeks certiorari to review the judgment of the Eighth Circuit Court of Appeals affirming the denial of his motion for accounting and to adjust a deficiency judgment in federal bankruptcy proceedings. A. 19.

This case arises from federal bankruptcy proceedings involving the St. Louis, Missouri, law firm of Popkin & Stern, which ceased doing business on September 30, 1991. A. 2; A. 57. For several years before the firm closed up shop, Petitioner Ronald U. Lurie was a general partner, and during 1991 he served as managing partner of Popkin & Stern. On September 3, 1991, Lurie was elected to a three-member liquidation committee to oversee the liquidation of the firm's assets. On March 4, 1992, an involuntary Chapter 7 petition for relief was filed against Popkin & Stern, which the firm elected to convert to Chapter 11. A. 58. On May 4, 1992, Robert J. Blackwell was appointed Chapter 11 trustee. A. 60. Lurie and one other partner were designated representatives of the partnership for purposes of the bankruptcy case. A. 58.

It eventually became apparent that the assets of the firm might be insufficient to pay the creditors. A. 58. In September of 1992, the firm filed a complaint for injunctive relief seeking to enjoin several law suits from proceeding against Popkin & Stern partners. The sponsoring partners, including Lurie, agreed to contribute funds to a

reorganization plan. A. 22. Lurie submitted a financial statement in August, 1992. Eventually, Popkin & Stern reached a settlement agreement with its major creditors by which some partners of the firm, including Lurie, agreed to make payments to the liquidating trustee over a period of six years. A. 22. Lurie's agreed contribution was $361,704.00. A. 22; A. 60. The settlement agreement included a stringent default clause. *See*, A. 61-64. Lurie was found to be in default when he sold his personal residence, allegedly reinvesting the proceeds in a new home in Bozeman, Montana, without giving prior notice to the trustee. An attempt to cure the default was unsuccessful, and the bankruptcy court found that Lurie violated the interim order approving the settlement. A. 8. Pursuant to the default clause in the settlement agreement, the bankruptcy judge found Lurie to be in breach of the settlement agreement and therefore liable for the entire deficiency in the Popkin & Stern bankruptcy, stating:

> The amount of the *estimated* deficiency of the P&S Bankruptcy Estate is $1,121,743. This amount is the difference between the value of the property of the Debtor's estate and the amount of the allowed claims against the Debtor.

The court ordered in its judgment that "if the amount of the deficiency is ultimately determined to be less than the amount of this judgment, the Liquidating Trustee shall move this Court to reduce this judgment." A. 53-54.

The liquidating trustee obtained a bankruptcy judgment against petitioner's wife, Nancy Lurie, in the amount of $352,300.95 on the basis of several transfers of property from petitioner. The bankruptcy court ordered that "if any property owned by the Luries as tenants by the entireties is liquidated under a Writ of Execution, *the full amount*

of the proceeds shall be applied to both the Deficiency Judgment and the Judgment entered against Nancy Lurie." A. 66. Pursuant to that judgment, a painting belonging to the Luries, "Apache Renegades," was seized in Arizona and sold for more than $200,000. Contrary to the terms of the judgment, the liquidating trustee failed to credit the proceeds of that sale toward the judgment entered against Nancy Lurie. Mrs. Lurie then moved in the bankruptcy court to determine the ownership of the execution proceeds. A. 70. The trustee argued that the *Rooker-Feldman* Doctrine precluded the bankruptcy court from entertaining Mrs. Lurie's motion, claiming that the Arizona state court judgment authorizing the seizure and sale of the painting resolved the question of how the proceeds should be credited. A. 71. Mrs. Lurie prevailed on appeal to the court below, and in the summer of 2000 the judgment against her was fully satisfied. A. 44. She then moved to lift a court-ordered freeze on two other pieces of artwork located in New Mexico and Wyoming, alleging that the satisfaction of the judgment against her extinguished the trustee's right to proceed against jointly held property. A. 44. The bankruptcy court denied her motion, and granted the Trustee's request to proceed with an execution against the artwork and all assets generally. A. 45. The court also ordered "that Ronald Lurie, Nancy Lurie, Michael Lurie and Ryan Lurie are barred by collateral estoppel and res judicata to challenge either the October 20, 1994 Judgment against Ronald Lurie or the Popkin & Stern deficiency amount." A. 45-46. Although petitioner was not a party to that proceeding, the court below found that he was aggrieved by the court's ruling and had standing to appeal. A. 50.

On appeal, petitioner argued that the bankruptcy court had no jurisdiction to enter the order barring him

from challenging the October, 1994, judgment in that he was not a party to the proceeding involving Nancy Lurie. The court below agreed, holding that "the status of [the October, 1994 judgment] and specifically, whether the judgment could or should be altered, amended or clarified can only be made by motion brought by the Trustee in the action against Lurie, not in Nancy Lurie's case." A. 52. The court ruled that the bankruptcy court had no jurisdiction to enter the portion of the judgment prohibiting Lurie from challenging the October, 1994, judgment, and was therefore void "as it applies to Lurie." *Id.* Accordingly, the court reversed the order of the bankruptcy court "to the extent that it purports to bar Ronald U. Lurie from challenging that portion of the Lurie judgment." A. 52.

Lurie thereafter moved in the bankruptcy court to modify the October, 1994, judgment. He alleged, inter alia, two circumstances that justified the relief he requested. First, the estimated deficiency overstated the value of claims against Popkin & Stern that were subsequently settled for far less than the value assigned those claims in the calculation of the estimated deficiency. Second, the biggest creditor in the bankruptcy, 8182 Maryland Associates, LLP, obtained a civil judgment against Petitioner in the Circuit Court of St. Louis County, Missouri, in the amount of $3,574,042.60 based on the same claim it had asserted in the Popkin & Stern bankruptcy, and had applied Lurie's interest as a partner in 8182 Maryland toward that judgment.

The over-valued claims involved four legal malpractice actions filed against Popkin & Stern. Since each claim was covered by Popkin & Stern's malpractice insurance carrier, Old Republic, the Trustee valued the claims at $100,000 each, the amount of the deductible under the insurance policy. Thus, these four claims were valued at $400,000 in

the "estimated" deficiency of $1,121,743. A. 55. The Trustee objected to all four malpractice claims, which were eventually settled for a total of $150,000, or $250,000 less than the amount on which the October, 1994 judgment was based. A. 30.

Popkin & Stern had leased its office space from the 8182 Maryland partnership, of which Lurie was a member. The claim against the bankruptcy estate was based on Popkin & Stern's default on its lease. That claim was valued at $976,806.02 by the bankruptcy court. A. 4. On March 11, 1996, 8182 Maryland obtained a judgment against Lurie in the Circuit Court of St. Louis County, Missouri, in the amount of $3,574,042.60. Lurie's interest in 8182 Maryland was valued at $400,000 and applied toward the judgment by the state court, leaving Lurie owing more than $3 million under that judgment.

REASONS FOR GRANTING THE WRIT

I. PETITIONER RONALD LURIE WAS DEPRIVED OF DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHEN THE RESPONDENT LEVIED ON PETITIONER'S ASSETS TO SATISFY A DEFICIENCY JUDGMENT WITHOUT FIRST DETERMINING IF THE DEFICIENCY STILL EXISTED AT THE TIME OF THE LEVY.

A. The judgment levied upon was based upon estimated damages.

The genesis of this action was Petitioner's request for an accounting. He moved the bankruptcy court for an accounting to determine if there was, at the time of his

motion, a shortfall in the bankruptcy estate which would trigger his liability under a deficiency judgment obtained by the Respondent. All he asked for was proof that there was still a reason for the Respondent to attempt to levy against his property to satisfy debts of the estate.

There is no dispute that the only basis upon which the Respondent, a Liquidating Trustee in bankruptcy, could seize the assets of Petitioner, a general partner of a bankrupt professional partnership, was by virtue of a judgment obtained pursuant to 11 U.S.C. §723(a). A. 4. There is likewise no dispute that, at the time the judgment was obtained, it was based upon an estimate of the deficiency that would result after liquidation of the partnership assets and application of those sums to the then-remaining allowed claims of partnership creditors. A. 4. A calculation of that deficiency, as it existed at the time of the judgment only, is attached and incorporated herein. A. 54-55.

B. The Respondent had an affirmative duty by the terms of the deficiency judgment itself, to adjust the judgment as the estimated deficiency changed.

The calculations relied on by the bankruptcy court in fashioning the order granting Respondent a deficiency judgment included line items that would decrease over time as conditions changed. Allowed claims might be reduced by sums distributed to the claimants. Pending unsecured claims, which are, in fact, contingent liabilities, might be reduced by compromise settlements of the claims or failure of proof or successful litigation by the debtor. Regardless of the cause of the change, the balance between assets and liabilities in the estate was in constant flux. On

any given day, an event could occur which could substantially change the obligation of the debtor partnership to the creditors. For that reason, on any given day, an event could occur which could substantially change the Petitioner's obligation to the Respondent because the Respondent's judgment against Petitioner was entirely derivative of the partnership/debtor's obligations to its creditors.

Out of recognition of this economic reality, the court that empowered Respondent to collect sums from the Petitioner commanded the Respondent as follows: "If the amount of the deficiency is ultimately determined to be less than the amount of this judgment, the Liquidating Trustee *shall* move this Court to reduce this judgment." A. 4. (emphasis added).

C. Events occurred which reduced, or perhaps, eliminated the deficiency, but the Respondent did not "move [the bankruptcy court] to reduce [the] judgment."

When the bankruptcy court ruled in favor of the Respondent on the deficiency judgment, it simultaneously released creditors who held unsecured claims from the terms of an injunction that operated to extend the automatic stay. This release allowed the creditors to pursue the Petitioner/general partner in litigation outside the bankruptcy estate. They did so. One such creditor, 8182 Maryland Avenue Associates, held an unsecured claim based on an unexpired lease in the amount of $1,993,899 which constituted the bulk of the "Allowed unsecured claims" shown in the Deficiency Calculation that totaled $2,078,488. A. 54. When released to pursue its remedies outside bankruptcy court, 8182 Maryland Avenue Associates obtained a judgment in Missouri state courts against

Petitioner, based on *exactly* the same theory of liability as its bankruptcy claim, in the amount of $3,500,000.

An "election of remedies" is the act of choosing between different remedies allowed by law on the same set of facts, where the party has but one cause of action, one right infringed, one wrong to be addressed. *Geo. A. Hormel Co. v. First Nat'l Bank*, 212 N.W. 738 (Minn. 1927). While sometimes calling it a "harsh doctrine," the Eighth Circuit recognizes that the doctrine's purpose is to prevent the claimant from collecting twice for a single misdeed against it. *Twin Cities Fed. Sav. & Loan Assoc. v. Transamerica Ins. Co.*, 491 F.2d 1122 (8th Cir. 1974).

The claims that were allowed 8182 Maryland by the bankruptcy court and the judgment granted 8182 Maryland by a Missouri court of general jurisdiction were different only in amount because of restrictions placed on claims for unexpired leases in bankruptcy. The theory of recovery was identical, and the money judgment this creditor obtained in the Missouri courts included all the amounts it was allowed to claim in the bankruptcy court. If the bankruptcy trustee, Respondent herein, were permitted to execute on the deficiency judgment he obtained based on the claim of this creditor, and, if the creditor were allowed to execute on its state court judgment without credit or offset for the claim it had been allowed in bankruptcy, the creditor would be receiving an impermissible double recovery and Petitioner would stand to be deprived of property without due process of law and in direct violation of the terms of the deficiency judgment itself. That is precisely what happened. The very damage that the Eighth Circuit declared that the "election of remedies" doctrine was designed to prevent was allowed to be inflicted on Petitioner. The Eighth Circuit's failure to follow

its own precedent, without mentioning or overruling same, is an egregious violation of Petitioner's due process rights.

To make matters worse, in spite of the election of the creditor to obtain its relief for the unfulfilled lease agreement outside the bankruptcy court, the trustee did not make any effort to re-calculate the deficiency or inform the bankruptcy court of the change in circumstances as he was required to do. In fact, he continued to execute his (now substantially reduced) judgment and not provide any accounting to the court therefor.

However, this was not the only change in the amount of the claims that would have triggered a substantial reduction in the liabilities in the estate and therefore, in the deficiency judgment obtained by the Respondent. The deficiency calculation included pending unsecured claims (legal malpractice claims) in the estimated amount of $400,000 for claimants May, Shelton, Squires Way, and Lenich. A. 55. Those claims were actually settled and paid by the debtor partnership in the amount of $150,000 meaning that another $250,000 should have been deducted from the total liabilities of the partnership, and thus, from the deficiency judgment against the general partner/Petitioner. A. 28; A. 30. Rather than discharging his absolute duty to "reduce this judgment" as required by the bankruptcy court, the Respondent/trustee continued to levy on the full amount of the deficiency judgment. In so doing, Petitioner was deprived of property in violation of due process of law and the express terms of the judgment of the bankruptcy court.

D. The appellate courts have failed to remedy this due process violation because they have misinterpreted this Court's decision in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

The lower appellate courts have relied upon this Court's decision in *Rooker* and the so-called *Rooker-Feldman* Doctrine to decline to consider whether the deficiency calculation should have been reduced as a result of the election of remedies reflected by the state court judgment obtained by 8182 Maryland Associates. Holding that the *Rooker-Feldman* Doctrine works to deprive lower federal courts of jurisdiction to review state court judgments, the appellate courts herein willfully ignored the constitutional issues implicit in the resulting deprivation of Petitioner's property as well as the unjust enrichment to the creditor (and the trustee by virtue of his commission earned based on the size of the bankruptcy trust). The courts below have perpetuated the fiction that a judgment that the trustee is *required* to adjust in the event of any diminution of the value of the claims against the estate can be treated as a final, executable judgment just by calling it so. By this ruling, the federal courts below have effectively repealed the laws of every state in the union which require judgments to be in ascertainable, certain, amounts before execution can issue.

The message of the Popkin & Stern litigation thus far is that a bankruptcy trustee is unlike any other judgment creditor. While other judgment creditors seeking to execute their judgments under state law have to have fully liquidated, ascertainable judgments, the bankruptcy trustee holding a deficiency judgment can go from state to state at will, never having to account for reductions in

allowed claims that make his judgment anything but ascertainable and perhaps even non-existent. The legacy of Popkin & Stern is that a creditor can seek relief under identical theories in state and bankruptcy court and collect twice while the trustee keeps tacking on fees and commissions.

Only this Court can correct this misinterpretation and misapplication of *Rooker* and grant Petitioner due process of law.

II. PETITIONER WAS DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THE RESPONDENT, A LIQUIDATING TRUSTEE IN BANKRUPTCY, WITH THE APPROVAL OF THE BANKRUPTCY COURT, ADDED POST-JUDGMENT INTEREST TO A DEFICIENCY JUDGMENT OBTAINED PURSUANT TO 11 U.S.C. §723(A) WITHOUT FIRST DETERMINING WHETHER SUCH A DEFICIENCY EXISTED AT THE TIME THE INTEREST WAS ADDED AND IN VIOLATION OF THE BETTER-REASONED FEDERAL DECISIONS HAVING CONSIDERED THE ISSUE.

A. The judgment obtained by Respondent is based upon an estimated shortfall in the bankruptcy estate that may not have existed at the time interest was added by the trustee to the judgment.

For all the reasons set forth in the previous section of this Petition, it is clear that the judgment against

Petitioner was, and is, subject to substantial revision. Without calculating on any given day what the total liabilities and total assets of the bankruptcy estate actually are, it would be impossible to determine what the amount of the deficiency judgment actually is, or if there is any deficiency at all. The Liquidating Trustee, being the person in the best position to know the status of the claims versus the assets, is required by the terms of his judgment against the Respondent to reduce the judgment accordingly. Because he did not do so, it is impossible for an objective observer to determine, on any given day, the amount of the judgment.

The requirement that the Trustee/Respondent motion the court for a reduction in the amount of the deficiency judgment as the underlying calculations change is not unlike a situation in which a judgment is obtained, the cause remanded, and then the judgment is reinstated in the proper amount. That was precisely the situation encountered by this Court and the Tenth Circuit in *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 355 (10th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980) where it was held that where damages are recalculated after remand, interest accrues from the date the damages are correctly calculated. *Id.* at 336. Similarly, when the Trustee accounts for the lawful reductions in the liabilities of the debtor in this action, there may or may not be a deficiency remaining. If there is, then and only then can interest be permitted to accrue.

B. This Court ruled in *Kaiser Aluminum and Chem. Corp. v. Bonjorno*, 494 U.S. 827 (1990), that post-judgment interest may be added to a judgment under 11 U.S.C. §1961 from the time that judgment becomes "ascertained in a meaningful way." The decision of the Eighth Circuit in the instant case creates a split of authority between the Second Circuit and the Eighth Circuit with respect to interpretation of 28 U.S.C. §1961 and this Court's decision in *Kaiser Aluminum*.

This Court held that post-judgment interest under 28 U.S.C. §1961 does not run from the time of a verdict, but rather from when the amount of the judgment becomes "ascertained in a meaningful way." *Id.* at 836.

The decision of the Second Circuit Court of Appeals in *Andrulonis v. U.S.*, 26. F.3d 1224 (2nd Cir. 1994) is in accord, in holding that the date that the federal government was entitled to post-judgment interest on its contribution judgment against the New York State Department of Health is the date that the contribution award ripened into an unconditional, ascertained, and enforceable judgment. *Id.* at 1233. In *Andrulonis*, the event that had to occur in order for the federal government to be able to start collecting interest was when it had paid more than its pro rata share of the judgment against it to Mrs. Andrulonis. Then and only then could the actual amount owed by New York to the U.S. be calculated.

Similarly, it is only when the Respondent fulfills his court-ordered duties under the judgment and makes all the necessary adjustments to the judgment based upon the changes in the assets and liabilities of the debtor/

partnership that there is a basis upon which the interest can be computed. If there is no deficiency as a result of the changes, obviously there would be no interest accruing from the date that the liability- reducing event occurred. If the deficiency is reduced, but not eliminated, there would only be liability for interest on the lesser amount. But when the Respondent/trustee makes no adjustments, the judgment has not been "ascertained in a meaningful way" as is required by *Kaiser Aluminum*. When the Eighth Circuit ruled otherwise, it misinterpreted this Court's holding in *Kaiser Aluminum* and created an obvious conflict between itself and the Second Circuit in interpretation of *Kaiser Aluminum* and the underlying statute, 28 U.S. C. §1961.

Only this Court can resolve this conflict and restore Petitioner's due process rights.

III. PETITIONER HAS BEEN DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT RESPONDENT, A LIQUIDATING TRUSTEE IN BANKRUPTCY, HAS ADDED SUBSTANTIAL ADMINISTRATIVE COSTS AND FEES TO A DEFICIENCY JUDGMENT OBTAINED PURSUANT TO 11 U.S.C. §723(A).

A. The bankruptcy court and the Eighth Circuit permitted the addition of more than $27,000 in administrative fees and costs to the "final, unalterable deficiency judgment."

The Respondent asked the bankruptcy court to increase the deficiency judgment by $27,000 for the costs

and fees incurred in fighting off Petitioner's motion for an accounting (which asked for nothing more than the judgment itself required the Respondent to do). The bankruptcy court granted the increase, the bankruptcy appellate panel took it away, and the Eighth Circuit added it back in.

It seems that the deficiency judgment fashioned by the bankruptcy court is routinely declared "final and unalterable" when the Petitioner seeks to have it reduced by claims that have been compromised and funds that have been paid outside bankruptcy. However, if the Respondent wants to change the judgment by adding fees and expenses pursuant to 11 U.S.C. §503, the bankruptcy court and the Eighth Circuit have ruled that it can absorb that sort of an increase without destroying its "unalterable" character. The Eighth Circuit explained how such a result was possible: "We also do not read the bankruptcy court's decision as adding the costs and fees to the 1994 judgment. Instead, we read the bankruptcy court's decision as merely assessing those costs to the amount Lurie still owes to the Liquidating Trust from the 1994 Judgment." Stated more honestly: "If we say that the judgment can be changed, that would imply that the judgment is not final and therefore not executable. So, we are not going to say we are changing the judgment, we are saying that we are changing the amount the Petitioner owes on the judgment that cannot be changed."

B. The decision of the Eighth Circuit is in conflict with Tenth Circuit decisions and is based on a gross misinterpretation of 11 U.S.C. §723(a).

The right of a trustee to collect against a general partner comes solely from §723: "the trustee has a claim

against the estate of each general partner . . . for the full amount of all claims of creditors allowed in the case. . . ." What the trustee is allowed to collect then are the claims of "creditors." Is a liquidating trustee a "creditor"? The court in *In Re Hoover*, 268 B.R. 227 (Bk. C.D. Cal. 2001) said no. "The term 'creditor' is defined in §101(10) and the definition does not include administrative expenses of the bankruptcy estate." *Id.* at 236. The *Hoover* court examined the legislative history of §723:

> The House amendment is a compromise between similar provisions contained in the House bill and the Senate amendment. The section makes clear that the trustee of a partnership has a claim against each general partner for the full amount of all claims of creditors allowed in the case concerning the partnership. By restricting the trustee's rights to the claims of creditors, the trustee of the partnership will not have a claim against the general partners for administrative expenses. . . .

P.L. 95-595, Senate Debate on Compromise Bill, 124 Cong. Rec. S17403-34 (October 6, 1978).

The Eighth Circuit, in its barely-concealed zeal to bring this bankruptcy estate to a close, did not analyze the trustee's authority in light of the plain language of §723 or the legislative history of the section. The circular reasoning and intellectual dishonesty of its decision stands in sharp contrast to the *Hoover* court's ruling and constitutes a blatant denial of the due process rights owed Petitioner.

Petitioner asks this Court to restore due process of law.

CONCLUSION

For the foregoing reasons, petitioner Ronald U. Lurie respectfully requests that this Court grant the writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit, or in the alternative, grant the writ, vacate the judgment below, and remand the case for further consideration.

Respectfully submitted,

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(816) 363-2795

**Counsel of Record*

United States Bankruptcy Appellate Panel
FOR THE EIGHTH CIRCUIT

No. 02-6041EM

In re:	*	
Popkin & Stern,	*	
Debtor.	*	Appeal from the United States Bankruptcy Court for the Eastern District of Missouri
Robert J. Blackwell, Liquidating Trustee of the Popkin & Stern Liquidating Trust,	*	
Plaintiff-Appellee,	*	
v.	*	
Ronald U. Lurie,	*	
Defendant-Appellant.	*	

Submitted: November 12, 2002
Filed: January 13, 2003

Before KRESSEL, DREHER, and FEDERMAN, Bankruptcy Judges.

DREHER, Bankruptcy Judge.

Ronald U. Lurie ("Lurie") appeals the bankruptcy court's order of July 19, 2002, finding that the 1994 judgment against Lurie was for a sum certain, was not subject to modification or adjustment, was not ambiguous, contingent or derivative, and was subject to collection and execution. For the reasons set forth below, we affirm.

FACTS and PROCEDURAL HISTORY

This dispute arises in the continuing saga of the bankruptcy case of Popkin & Stern, a Missouri law firm ("Debtor"). Lurie was the managing partner of the firm at the time Debtor's creditors commenced an involuntary chapter 7 bankruptcy case against the Debtor in March 1992. Debtor then converted the case to one under chapter 11, and Appellee Robert Blackwell ("Blackwell") was appointed trustee.

On August 27, 1993, the bankruptcy court confirmed Debtor's proposed plan of reorganization ("the plan"). The plan provided for the creation of a liquidating trust to collect Debtor's assets and distribute them to creditors pursuant to the terms of the plan. The plan further provided that Blackwell would be the trustee of the liquidating trust. Lurie agreed to contribute $361,704.00 to the liquidating trust. The terms and conditions relating to his contribution were set forth in the plan, a Participant Settlement Agreement, a First Participant Settlement Note executed August 21, 1993, a Second Participant Settlement Note executed August 21, 1993, and a Deed of Trust executed August 27, 1993. The plan also provided that each partner contributing to the liquidating trust (termed a "Settling Participant") would receive a release from creditors of any and all claims relating to the liabilities of Debtor, and that an injunction would be issued to enforce said release.

In the plan, Section 5.2(a) sets forth the default provisions.[1] Additionally, Section 5.2(c) provided that each Settling Participant consented to the jurisdiction of the bankruptcy court. It further provided that, in the event of default by the Settling Participant, Blackwell had standing to assert a claim for relief against such defaulting Settling Participant to seek payment of any deficiency in the liquidating trust and estate obligations.

Furthermore, in Lurie's Participant Settlement Agreement he consented to all the terms and conditions of the plan, and agreed to satisfy all obligations contained in the first and second Participant Settlement Notes. Lurie subsequently defaulted in his obligation to pay the

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[1] Paragraph 5.2(a) of the Plan states:

(a) Any default under the Participant Settlement Agreement shall vitiate the releases given to the Settling Participant under the Plan (but only as to the defaulting Settling Participant and not as to other Settling Participants that are not in default of their obligations under their Participant Settlement Agreement; releases given by the defaulting Settling Participants to Released Parties shall remain in full force and effect, except for defensive purposes as set forth below) and shall reinstate the defaulting Settling Participant's liability, if any, to the Debtor's creditors for the Debtor's obligations, subject to any defenses, claims and counterclaims that such defaulting Settling Participant may have (and subject to the provisions of Section 5.2(c) below) (such defenses and counterclaims shall be solely for the purpose of offset against the defaulting Settling Participant's liability and for no other purpose, including any affirmative recovery against any Release Party) provided however, that any payments previously made by such defaulting Settling Participant, and further provided that no creditor shall be allowed to recover more than the amount of its claim less all distributions on account of such Claim.

liquidating trust and Blackwell, as part of his duties as the liquidating trustee, filed an adversary complaint against Lurie.

On October 20, 1994, after a trial on the merits, the bankruptcy court granted judgment in favor of Blackwell and against Lurie for $1,121,743.00 ("the Lurie judgment"). The Lurie judgment was based on the estimated deficiency in the liquidating trust that could be assessed against Lurie, as a partner of Debtor. It also provided that if the amount of the deficiency was ultimately determined to be less than the amount of the judgment, "the Liquidating Trustee [Blackwell] shall move this court to reduce this judgment." Lurie appealed the judgment to the District Court, but the appeal was dismissed due to his failure to file his brief. In 1997, the Lurie judgment was revived by order of the bankruptcy court and Lurie again appealed. The Eighth Circuit affirmed the order of the bankruptcy court reviving the Lurie judgment. *Blackwell v. Lurie (In re Popkin & Stern),* No. 97-6091EMSL, slip op. (B.A.P. 8th Cir. March 5, 1998) (unpublished), *aff'd, Blackwell v. Lurie (In re Popkin & Stern),* 168 F.3d 494 (8th Cir. Dec. 23, 1998) (unpublished). On October 30, 2000, the Lurie judgment was revived a second time. That order was not appealed by Lurie.

While Blackwell was pursuing a judgment against Lurie in bankruptcy court, Lurie's default on his Participant Settlement Agreement, the plan and Liquidating Trust Agreement allowed participating creditors, including 8182 Maryland Associates ("8182 Maryland"), to pursue their claims against him. 8182 Maryland held an allowed claim in the Debtor's bankruptcy case for $976,806.02, but 11 U.S.C. § 502(b)(6) limited its claim against the estate to an amount less than 8182 Maryland's actual damages. It

sued Lurie, among others, in the Circuit Court of St. Louis County, Missouri, and obtained a judgment against Lurie in the amount of $3,574.042.60 ("the 8182 Maryland judgment"). Thereafter, 8182 Maryland obtained a certification of final judgment, Lurie appealed, and the order was affirmed. *8182 Maryland Assoc. v. Lurie,* 949 S.W.2d 150 (Mo. Ct. App. 1997).

Since the date of the Lurie judgment and the 8182 Maryland judgment, 8182 Maryland and Blackwell have recovered some funds on their respective judgments. In addition, some creditor claims against the estate have been reduced. In response to these changing circumstances, Lurie filed a motion in the bankruptcy court on October 10, 2001, for an accounting, adjustment, statement of amount due, stay and voiding of executions. In response to this motion, the bankruptcy court entered an order directing Blackwell to file and serve an accounting and report of the Debtor's liquidating trust. Blackwell complied with the bankruptcy court's order and a series of objections by Lurie and responses by Blackwell followed.

On April 17, 2002 Lurie filed another motion seeking adjustment, release and abandonment of judgment and voiding the stay of executions. Shortly thereafter, Lurie filed a motion for a hearing requesting an evidentiary hearing on the October 10 and April 17 motions. The primary relief sought by Lurie in his motions was a declaration by the bankruptcy court that the Lurie judgment was not a final judgment for a sum certain, could be adjusted to reflect collections by Lurie and reductions in claims, and to stay Blackwell's attempts to further collect on the Lurie judgment. An evidentiary hearing was held on June 17, 2002, on Lurie's October and April motions,

and on July 19, 2002, the bankruptcy court denied all relief requested in both.

The bankruptcy court also made the findings of fact and conclusions of law determining that the liquidating trust was entitled to reasonable costs of the accounting and supplemental accounting in the amount of $14,224.50, and $12,955.00 as reasonable attorney fees incurred by the Trustee in the defense of the motions. The bankruptcy court concluded that these costs could be added to the Lurie judgment. Lurie appeals from the July 19, 2002, order.

STANDARD OF REVIEW

We review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. *Papio Keno Club, Inc. v. City of Papillion (In re Papio Keno Club, Inc.),* 262 F.3d 725, 728-29 (8th Cir. 2001). Reversal under the clearly erroneous standard is proper only if the decision was "unsupported by substantial evidence, based on an erroneous interpretation of applicable law, or, in light of the entire record, we are left with a firm and definite conviction that a mistake has been made." *United States v. Jorgensen,* 871 F.2d 725, 728 (8th Cir. 1989); *see Anderson v. City of Bessemer City,* 470 U.S. 564, 573 (1985).

ISSUES

Lurie raises four issues on appeal:

1) Since the Lurie judgment was based on estimated amounts due and subject to satisfaction if the actual deficiencies were less than the amount of the judgment, did the bankruptcy court err in finding that the Lurie

judgment was for a final liquidated sum certain and should not be adjusted to reflect the reduction in certain claims against the bankruptcy estate;

2) If court erred in determining the Lurie judgment was final and for a sum certain, did the bankruptcy court also err in ruling that interest could accrue under 28 U.S.C. § 1961 commencing the date on which the Lurie judgment was entered;

3) Did the bankruptcy court also err in ruling that the Lurie judgment is subject to execution and collection proceedings;

4) And finally, did the bankruptcy court err in assessing the administrative and legal expenses incurred by or on behalf of Blackwell as liquidating trustee and adding those amounts to the amount of the Lurie judgment.

DECISION

The first three issues raised by Lurie are inseparable. If the Lurie judgment was a final and appealable judgment for a sum certain, it follows that interest must accrue on the amount of the judgment and the judgment may be collected by any legal means available to Blackwell as liquidating trustee.

Lurie argues that the Lurie judgment was derived from and contingent upon the claims of Debtor's creditors and the determination of an actual deficiency in Debtor's estate. Lurie is correct that the Lurie judgment was based upon estimated claims, but he fails to recognize that the Lurie judgment was not an estimated judgment. It was, as the bankruptcy court found, a final judgment for a sum

certain and unalterable. Claim preclusion, also known as res judicata, prevents him, more than eight years after the fact, from contesting the judgment under the guise of a motion.

> In applying the Eighth Circuit test for whether the doctrine of *res judicata* bars litigation of a claim, we examine whether (1) a court of competent jurisdiction rendered the prior judgment, (2) the prior judgment was a final judgment on the merits, and (3) both cases involved the same cause of action and the same parties.

Canady v. Allstate Ins. Co., 282 F.3d 1005, 1014 (8th Cir. 2002). The judgment against Lurie meets this test. The bankruptcy court was the court of competent jurisdiction. The Lurie judgment was a judgment on the merits, involved the same parties, Lurie and Blackwell, and the same cause of action, the amount Lurie owes as the result of his default of his obligations to the liquidating trust. Lurie appealed the judgment and the District Court dismissed the appeal. Lurie also appealed the 1997 order reviving the Lurie judgment and again the Bankruptcy Appellate Panel and the Eighth Circuit Court of Appeals affirmed. The 2000 order reviving the same judgment was not contested or appealed. The Lurie judgment is a final judgment for all purposes and not contingent, derivative, or unambiguous.

Lurie also argues that the Lurie judgment should be adjusted to reflect a reduction in claims against the estate. In particular, Lurie contends that under an election of remedy theory the 8182 Maryland claim is no longer a proper claim against the estate and that four malpractice claims, exceeding $2,000,000.00, have been settled for $300,000.00.

The election-of-remedies doctrine does not apply, however, in this situation. The election-of-remedies doctrine bars the pursuit of inconsistent claims for relief and prevents double recovery for a single injury. *See Kansas State Bank in Holton v. Citizens Bank of Windsor,* 737 F.2d 1490, 1498-99 (8th Cir. 1984). Until it filed suit in Missouri after Lurie's default, 8182 Maryland did not have a judgment against Lurie. Once Lurie defaulted, 8182 Maryland was entitled to obtain a determination of the amount of its claim against Lurie. 8182 Maryland's claim against Debtor did not change as the result of its judgment; its seeking a judgment was not inconsistent with its filing a claim against the Debtor, and nothing in the bankruptcy court record suggests it is attempting to or has collected twice for a single injury. The bankruptcy court's finding that 8182 Maryland still has an outstanding balance on its judgment of more than $3,000,000.00 and still maintains a valid claim against the bankruptcy estate is not clearly erroneous.

As to the reduction of other claims against the estate, Lurie is correct that if Blackwell successfully reduces the amount of the claims against the estate or brings in assets from other sources sufficient to bring the deficiency below the amount of the judgment, Lurie is entitled to a satisfaction of the judgment. The bankruptcy court took evidence, made findings indicating that this had not yet happened and those findings are not clearly erroneous. Lurie is not entitled to a reduction in the amount of his judgment, if any, until all claims have been determined and final payment made to creditors under the terms of the liquidating trust.

Since the bankruptcy court correctly determined that the Lurie judgment was a final judgment for a sum

certain, interest accrues on the judgment. Under Title 28 § 1961, "interest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a). "Because a bankruptcy court is part of the district court, the statute applies to bankruptcy proceedings," *Pester Refining Co. v. Ethyl Corp. (In re Pester Refining Co.),* 964 F.2d 842, 849 (8th Cir. 1992), and "[p]ost-judgment interest accrues when damages are 'quantified in a final, appealable judgment.'" *Vic Bernacchi & Sons, Inc. v. Loxas (In re Vic Bernacchi & Sons, Inc.),* 170 B.R. 647, 656 (Bankr. N.D. Ind.1994) (*quoting Wheeler v. John Deere Co.,* 986 F.2d 413, 416 (10th Cir. 1993)); *see also Rupp v. Omaha Indian Tribe,* 45 F.3d 1241, 1246 (8th Cir. 1995) ("liquidation occurs on the date of the judgment"). Therefore, the bankruptcy court did not err in finding that the judgment bore interest from October 20, 1994, the date of the judgment.[2] In addition, a final judgment is also subject to immediate collection. *See Swope v. Siegel-Robert, Inc.,* 270 F.3d 742, 743 (8th Cir. 2001). The bankruptcy court did not err in denying Lurie's motion to stay any execution or collection proceedings presently being pursued by Blackwell.

Lastly, Lurie contends that the bankruptcy court erred in ruling that the administrative and legal expenses incurred by or on behalf of Blackwell as liquidating trustee should be added to Lurie's judgment. Since the bankruptcy court's order only denied Lurie's motions, this conclusion

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[2] If the judgment is later satisfied for less than the full amount, the interest still runs from October 20, 1994, although only on the actual amount needed to satisfy the judgment. *See Vic Bernacchi & Sons, Inc.,* 170 B.R. at 656.

of law made by the bankruptcy court is *dictum* and does not constitute reversible error. We do find that the bankruptcy court's conclusion of law adding on Blackwell's accounting and reasonable attorney fees to the amount of the judgment is incorrect. In determining the deficiency to be paid by the liquidating trust, part of the calculation is the fees and costs incurred by the trustee including those incurred by him in this proceeding; however, it does not follow that Blackwell may add those fees to the judgment. As the bankruptcy court concluded in its order, the amount of the Lurie judgment is final, a sum certain and unalterable. The bankruptcy court may not now alter it. *See Seimer v. Nangle (In re Nangle),* 281 B.R. 654, 660 (8th Cir. BAP 2002) (discussing when attorney fees may be appropriately assessed against a party in a bankruptcy case).

ACCORDINGLY, we affirm the order of the bankruptcy court.

A true copy.

Attest:

CLERK, U.S. BANKRUPTCY APPELLATE PANEL, EIGHTH CIRCUIT

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-3412

In re: Popkin & Stern, Debtor. Robert J. Blackwell, Liquidating Trustee of the Popkin & Stern Liquidating Trust, Appellant, v. Nancy Fendell Lurie; Ronald U. Lurie, Appellee.	*	Appeal from the United States Bankruptcy Appellate Panel for the Eighth Circuit [UNPUBLISHED]

Submitted: September 9, 2002

Filed: September 23, 2002

Before McMILLIAN, RICHARD S. ARNOLD, and MELLOY, Circuit Judges.

PER CURIAM.

Robert J. Blackwell, as liquidating trustee of the Popkin & Stern liquidating trust, appeals from a final order entered by the United States Bankruptcy Appellate Panel for the Eighth Circuit holding that Ronald U. Lurie has standing to appeal and that the United States Bankruptcy Court for the Eastern District of Missouri lacked personal jurisdiction over Lurie in the adversary proceeding against his wife, Nancy Lurie. *Blackwell v. Lurie (In re Popkin & Stern)*, No. 01-6020EM (B.A.P. 8th Cir. Sept. 4,

2001), *rev'g in part* Adv. No. 94-4461-399 (Bankr. E.D. Mo. Mar. 6, 2001).

Subsequent events have made the present appeal moot. Specifically, on July 19, 2002, the bankruptcy court entered an order in the adversary proceeding against Lurie finding that the 1994 judgment against Lurie was for a sum certain, was not subject to modification or adjustment, and was not ambiguous, contingent or derivative. *Id.*, Adv. No. 94-4192-399 (Bankr. E.D. Mo. July 19, 2002). Lurie has since filed an appeal from that order with the bankruptcy appellate panel. During oral argument in the present appeal, Lurie, appearing pro se, stated that he was not challenging personal jurisdiction in the appeal from the bankruptcy court's July 19, 2002, order.

Accordingly, we vacate the March 6, 2001, order entered by the bankruptcy court in Adv. No. 94-4461-399 as it applies to Lurie and the September 4, 2001, order entered by the bankruptcy appellate panel in No. 01-6020EM and dismiss the appeal as moot. The dismissal is without prejudice to any argument Lurie may raise in the appeal from the bankruptcy court's July 19, 2002, order with respect to the nature of the 1994 judgment.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-1838

In re: Popkin & Stern, Debtor.	*	
Robert J. Blackwell, Appellant,	*	Appeal from the United States Bankruptcy Appellate Panel for the Eighth Circuit
v.	*	
Nancy Fendell Lurie, Appellee.	*	

Submitted: December 14, 2001

Filed: May 15, 2002

Before LOKEN, RICHARD S. ARNOLD, and BYE, Circuit Judges.

LOKEN, Circuit Judge.

Robert J. Blackwell is the liquidating trustee in the protracted Popkin & Stern bankruptcy proceedings. In 1994, Blackwell obtained a deficiency judgment against Ronald Lurie, the managing partner of Popkin & Stern. Several years later, Blackwell obtained a judgment against Ronald Lurie's wife, Nancy Fendell Lurie, based on numerous fraudulent transfers from Ronald to her. In this part of the proceedings, Blackwell and Nancy dispute whether the proceeds from a sheriff's sale in Arizona should be applied, in whole or in part, to the fraudulent transfer judgment against her, as well as to Blackwell's judgment against Ronald. The bankruptcy court entered a

final order denying relief to Nancy. The Bankruptcy Appellate Panel (BAP) reversed and remanded the case to the bankruptcy court for further proceedings. The BAP's decision was not a final order. Accordingly, we dismiss Blackwell's appeal for lack of jurisdiction.

Blackwell's judgment against Nancy permitted him to execute on assets held jointly by Ron and Nancy up to the amount of the judgment. In late 1998, an art gallery in Arizona held a valuable painting entitled "Apache Renegades" on consignment. Both Ronald and Nancy Lurie claimed an interest in the painting, and at least one bankruptcy court order had listed it as jointly owned property. After "domesticating" the bankruptcy court judgments against Ronald and Nancy in the appropriate Arizona court, Blackwell obtained garnishment judgments against Ronald and Nancy. The judgments were identical, with one exception – the first identified Ronald as the owner of "Apache Renegades," while the second named Nancy as the painting's owner. Both judgments ordered the clerk of the Arizona court to issue writs of execution directing the sheriff to seize and sell the painting. The Luries received notice of these garnishment proceedings but did not appear.

Several weeks later Blackwell prepared a writ of execution based solely on the garnishment judgment against Ronald and directing the Arizona sheriff to sell "Apache Renegades" and apply the sale proceeds to reduce the outstanding balance of the bankruptcy court's judgment against Ronald. When Nancy received notice that the painting would be sold in partial satisfaction of the deficiency judgment against Ronald, she moved the bankruptcy court for a stay, claiming an interest in "Apache Renegades." The bankruptcy court denied the motion, and the painting was sold. Blackwell filed a partial satisfaction

of judgment with the Arizona court stating that the sale proceeds had been applied solely against the judgment against Ronald.

Nancy then filed a motion asking the bankruptcy court to determine ownership of the Arizona proceeds. The bankruptcy court denied the motion, concluding that the Arizona court had effectively decided the issue and therefore the *Rooker-Feldman* doctrine bars a federal court from revisiting it.[1] On appeal, the BAP reversed, concluding that the *Rooker-Feldman* doctrine was not implicated by Nancy's request that the bankruptcy court determine whether the sale proceeds should be applied to reduce any part of the bankruptcy court's judgment against Nancy. Blackwell appeals, arguing that Nancy was required to litigate her ownership interest in the Arizona proceedings.

"In bankruptcy cases, this court can hear appeals only from final decisions, judgments, orders, and decrees entered by district courts or bankruptcy appellate panels." *In re Kasden*, 141 F.3d 1288, 1290 (8th Cir. 1998); *see* 28 U.S.C. § 158(d). An order remanding to the bankruptcy court for further proceedings is not normally appealable unless the decision has effectively resolved the merits of the controversy and all that remains on remand is a purely mechanical or ministerial task "unlikely to generate a new appeal or to affect the issue that the disappointed party wants to raise on appeal." *In re Vekco, Inc.*, 792 F.2d 744, 745 (8th Cir. 1986). Here, at a minimum, the BAP's remand order requires the bankruptcy court to

[1] Under the doctrine derived from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983), lower federal courts lack jurisdiction to review state court judgments.

make a *de novo* determination of Nancy Lurie's ownership interest, if any, in the painting and its proceeds. Given the conflicting ownership claims described in Blackwell's reply brief and elsewhere in the record on appeal, it is obvious that this determination goes to the merits of the dispute and will be far more than a purely mechanical or ministerial task. Thus, the BAP's order is interlocutory, not final.

Finality for bankruptcy purposes is a complex subject, and there are times when the practical needs of the process require prompt appellate consideration of what appear to be interlocutory orders. *See, e.g., In re Koch*, 109 F.3d 1285, 1287 (8th Cir. 1997); *In re Huebner*, 986 F.2d 1222, 1223 (8th Cir. 1993). But here, Blackwell's brief on appeal simply asserts in conclusory fashion that this is an appeal of a "final judgment." Blackwell cites no peculiar need for immediate appellate review of this interlocutory bankruptcy order, and we perceive none. Moreover, none of the universal exceptions to the final order doctrine apply in this case – the issue was not certified for interlocutory appeal by the BAP, *see* 28 U.S.C. § 1292(b); there was no determination and entry of final judgment pursuant to Fed. R. Civ. P. 54(b); and a question of preclusion in a civil case, such as whether *Rooker-Feldman* applies, is not appealable under the collateral order doctrine. *See, e.g., R.R. Donnelley & Sons Co. v. FTC*, 931 F.2d 430, 432-33 (7th Cir. 1991).

Because we lack jurisdiction, the appeal is dismissed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

In re: POPKIN & STERN, Debtor. ROBERT J. BLACKWELL, Liquidating Trustee of the Popkin & Stern Liquidating Trust, Plaintiff. v. RONALD U. LURIE, Defendant.

Case No. 92-42218-399, Chapter 11, Adv. No.: 94-4192-399

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

2002 Bankr. LEXIS 1421

July 19, 2002, Decided

COUNSEL: For ROBERT J. BLACKWELL, Plaintiff: Christopher J. Rausch.

For ROBERT J. BLACKWELL, Plaintiff: James B. Day, Blackwell and Associates, O'Fallon, MO.

For ROBERT J. BLACKWELL, Plaintiff: Spencer P. Desai, Polsinelli, Shalton et al., St. Louis, MO.

For RONALD U. LURIE, Defendant: Robert L. Devereux, Devereux Murphy, St. Louis, MO.

For DANIEL L. DIERDORF, JAMES W. HART, Intervenors: Thomas E. Manns, St. Louis, MO.

For NANCY LURIE, Intervenor: Stanley E. Goldstein, St. Louis, MO.

For 8182 MARYLAND ASSOCIATES, Intervenor: Deborah A. Weedman, Clayton, MO.

For ROBERT J. BLACKWELL, Counter-Defendant: Spencer P. Desai, Polsinelli, Shalton et al., St. Louis, MO.

For Liquidating Trustee: Ms. Serall Chezem, Blackwell & Associates, P.C., O'Fallon, Missouri.

For 8182 Maryland Associates: Mrs. Debbie Weedman, Clayton, Missouri.

JUDGES: JUDGE BARRY S. SCHERMER, UNITED STATES BANKRUPTCY JUDGE.

OPINION BY: BARRY S. SCHERMER

OPINION: FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING RONALD LURIE'S MOTIONS AND RESPONSES THERETO HEARD ON JUNE 17, 2002

This matter is before the Court upon the Motion for Hearing filed May 2, 2002, by Defendant Ronald U. Lurie ("Defendant"). In the Motion for Hearing, the Defendant requests a hearing on the Motion for Accounting, Adjustment, Statement of Amount Due, Stay and Voiding of Executions filed by Defendant on October 10, 2001, ("October Motion") and the Motion to Adjustment, Release and Abandonment of Judgment Voiding and Stay of Executions field by Defendant on April 17, 2002 ("April Motion"). In response to the October Motion, this Court entered its Order dated October 17, 2001, directing the Liquidating Trustee to file and serve on Defendant an accounting and report of the Popkin & Stern Liquidating Trust. On November 9, 2001, the Liquidating Trustee filed his Accounting and Report Pursuant to Order of October 17, 2001 ("Accounting"). On November 27, 2001, the Defendant filed his Objection and Motion for More Specific Accounting Data and Information. On January 3, 2002, the Liquidating Trustee filed his Response to the October Motion and the Defendant's Objection. After a hearing, the Court entered its Order on February 20, 2002, on Motion for Stay of Execution denying the Defendant's Request for Stay included in the October Motion

and its Order granting the Liquidating Trustee an extension of time to file a supplemental accounting. On February 27, 2002, the Liquidating Trustee filed his Supplemental Accounting ("Supplemental Accounting"). On March 8, 2002, the Defendant filed his Further Objection and Motion for More Specific Accounting Data and Information and Request for Hearing ("March Motion"). On March 18, 2002, the Liquidating Trustee filed his Response to the March Motion. On March 21, 2002, the Court entered its Order denying the March Motion. The Defendant thereafter filed the April Motion. On May 3, 2002, the Liquidating Trustee filed his Response to the April Motion. On May 20, 2002, Defendant filed his supplemental Memorandum to Defendant's previous motions and supporting Memorandums.

An evidentiary hearing was held on the October Motion and the April Motion on June 17, 2002. Appearances were: Ronald Lurie-Pro Se; Serall Chezem for the Liquidating Trustee, Robert J. Blackwell; Robert J. Blackwell, Liquidating Trustee of the Popkin & Stern Liquidating Trust; and Deborah Weedman for 8182 Maryland Associates, Limited Partnership.

Robert J. Blackwell, Liquidating Trustee's exhibits A, B, C, D, E, F, G, H and I were stipulated to by all parties and received in evidence. Based on the stipulated exhibits, pleadings and memorandum, the Court file in the Popkin & Stern bankruptcy case, evidence, testimony and arguments at the evidentiary hearing, and in addition to the Findings of Fact and Conclusions of Law announced by this Court denying the requests of Defendant in his Motions, the Court makes the following Findings of Fact:

1. Popkin & Stern (hereinafter "P&S") was a law firm that operated in Clayton, Missouri. (Exhibit B, pg. 129)

2. Ron Lurie (hereinafter "Lurie") was a general partner of P&S for several years preceding the firm's cessation of business on September 30, 1991. (Exhibit B, pg. 129)

3. During 1991, Lurie served as managing partner of P&S. On September 3, 1991, Lurie was elected to a three member liquidating committee to oversee the liquidation of the firm's assets. (Exhibit B, pg. 129)

4. On March 26, 1992, an involuntary Chapter 7 Petition for Relief was filed against P&S. The firm elected to convert the case to a Chapter 11 and, on May 4, 1992, Robert J. Blackwell, by consent, was appointed as Chapter 11 Trustee. P&S named Lurie as one of two designated representatives of the partnership for purposes of the Bankruptcy Case. (Exhibit B, pg. 129)

5. During the course of the Chapter 11 Case, it became apparent the partnership assets would be insufficient to pay the creditors. As described by P&S in its Disclosure Statement, the deficiency between the partnership assets and liabilities was "substantial". Because the individual partners may have been jointly and severally liable for such deficiency, the partners started discussing the basis upon which each partner would contribute to a fund to be used to satisfy the claims of creditors. (Exhibit B, pg. 130)

6. In September, 1992, P&S filed a Complaint for Injunctive Relief in this Court seeking to enjoin several lawsuits then pending from proceeding against P&S partners. P&S's Complaint for Injunctive Relief alleged that certain partners, identified as "Sponsoring Partners", had formulated a Plan of Reorganization. The Complaint alleged

that the Sponsoring Partners agreed to contribute money to a Plan of Reorganization as a way of paying P&S's creditors. The Sponsoring Partners filed financial statements with P&S's Chapter 11 Trustee to "protect the interests of the creditors of P&S . . .". Lurie was a Sponsoring Partner. (Exhibit B, pg. 130) At trial, this Court granted P&S's Complaint for Injunctive Relief, temporarily staying all litigation against the partners of P&S to allow the partners sufficient time to formulate a consensual Plan of Reorganization with the law firm's numerous creditors. (Exhibit B, pg. 131)

7. P&S reached an agreement with its major creditors and ultimately confirmed, by Order of this Court entered August 27, 1993, a Plan of Reorganization (the "Plan"). An integral component of the Plan was the creation of a fund to pay claims of the law firm's creditors (the "Liquidating Trust"). Certain partners of P&S, including Lurie, agreed to make payments, over a period of up to six years, to the Liquidating Trustee. The monies contributed to the Liquidating Trust are distributed pro-rata to the creditors holding allowed claims against P&S. Robert J. Blackwell was appointed Liquidating Trustee under the Plan. (Exhibit B, pg. 131)

8. Lurie agreed to contribute $361,704.00 to the Liquidating Trust. The terms and conditions relating to his contribution are set forth in the Plan, a Participant Settlement Agreement, a First Participant Settlement Note executed August 21, 1993 ("First Note"), a Second Participant Settlement Note executed August 21, 1993 ("Second Note"), and a Deed of Trust executed August 27, 1993 wherein Lurie and Nancy Lurie, Lurie's wife, secured the obligations under the First Note, Second Note, and Participant Settlement Agreement by granting a Deed of

Trust to the liquidating Trustee on their residence located at #1 Deacon Drive, St. Louis, Missouri. (Exhibit B, pgs. 131-132)

9. The default provisions contained in the Participant Settlement Agreement and the Plan were heavily negotiated by the participating partners and creditors. The purpose of the default provisions was to give Lurie and all participating partners incentive to perform their respective obligations. (Exhibit B, pg. 132)

10. The Plan provides (i) that each partner contributing to the Liquidating Trust (termed a "Settling Participant") would receive a release from creditors of any and all claims relating to the liabilities of P&S, and (ii) that an injunction would be issued to enforce said release. (Exhibit B, pgs. 99 & 132)

Paragraph 5.2(a) of the Plan states:

> "(a) Any default under the Participant Settlement Agreement shall vitiate the releases given to the Settling Participant under the Plan (but only as to the defaulting Settling Participant and not as to other Settling Participants that are not in default of their obligations under their Participant Settlement Agreement; releases given by the defaulting Settling Participants to Released Parties shall remain in full force and effect, except for defensive purposes as set forth below) and shall reinstate the defaulting Settling Participant's liability, if any, to the Debtor's creditors for the Debtor's obligations, subject to any defenses, claims and counterclaims that such defaulting Settling Participant may have (and subject to the provisions of Section 5.2(c) below) (such defenses and counterclaims shall be solely for the purpose of offset against the defaulting

> Settling Participant's liability and for no other purpose, including any affirmative recovery against any Released Party) provided however, that any payments previously made by such defaulting Settling Participant shall not be returned to such defaulting Settling Participant, and further provided that no creditor shall be allowed to recover more than the amount of its claim less all distributions on account of such Claim."

11. Section 5.2(c) of the Plan provides that each Settling Participant consents to the jurisdiction of the Bankruptcy Court and, in the event of default by the Settling Participant, the standing of the Liquidating Trustee to assert a claim for relief against such defaulting Settling Participant under the Plan and § 723 of the Bankruptcy Code to seek payment of deficiency in the Liquidating Trust and Estate obligations. (Exhibit B, pgs. 99 & 133)

12. Lurie's Participant Settlement Agreement provides that he "consents to all the terms and conditions of the Plan, and agrees to satisfy all obligations contained herein and in the Note and the Second Participant Settlement Note . . .". (Exhibit B, pgs. 37 & 133)

13. The Liquidating Trustee filed an Adversary Complaint against Lurie in accordance with the Plan and 11 U.S.C. § 723 due to Lurie's default in his obligation to pay the Liquidating Trust. (Exhibit B, pg. 99) On September 26, 1994, the trial was held. Lurie was represented by an attorney, Robert Devereux. (Exhibit B, pg. 161, lines 24-25)

14. Lurie's attorney stated that the issue before the Court was a contract issue. (Exhibit B, pg. 167, lines 5-7) The Court found Lurie had defaulted in his agreements. The Amount of Lurie's liability was put into evidence at

trial. (Exhibit B, pgs. 226-233) Lurie's attorney cross examined the Liquidating Trustee in regards to his affidavit (known as exhibit 11) detailing how the deficiency was calculated. (Exhibit B, pgs. 232-235) Lurie's attorney stipulated to exhibit 11, the Affidavit of the Liquidating Trustee which contained the deficiency calculation, and further did not assert that the amount was incorrect. (Exhibit B, pg. 246, lines 21-25 and pg 247, lines 1-6) Lurie's attorney did not introduce any evidence or challenge the evidence of the Liquidating Trustee as to the amount of the P&S deficiency or how it was calculated.

15. The deficiency amount equaled the difference between the assets of the Debtor's estate including anticipated assets and the allowed claims of the Estate (known now and future anticipated claims). (Exhibit B, pg. 340-346) The calculation as shown in Exhibit 11, the Affidavit, included anticipated (referred to as "estimated") additional attorneys fees and expense, Liquidating Trustee's commission and accountant's fees. (Exhibit B, pgs. 340-346) None of the amounts used, actual or anticipated, were objected to by Lurie. After the hearing, Judge Karen See ruled from the bench. The Judge entered Judgment in favor of the Liquidating Trustee and against Lurie "as calculated by Mr. Blackwell in his affidavit which was admitted by stipulation". $1,121,743.00. (Exhibit B, pg. 262, lines 7-8) Judge Karen See also ruled that "I would provide one additional term which is that if it turns out that the deficiency is less than this ($1,121,743.00) in actuality, once everyone's paid and all fees and expenses are paid [emphasis added], then the Trustee would be ordered to satisfy or release this Judgment". (Exhibit B, pg. 279, lines 1-5) The following line ("Line") in the Judgment was derived from Judge Karen See's Statement and placed in

the Judgment. "If the amount of the deficiency is ultimately determined to be less than the amount of this Judgment, the Liquidating Trustee shall move this Court to reduce this Judgment." (Exhibit B, pg. 157)

16. The amount of the deficiency has never been ultimately determined to be less than the Final Judgment entered against Lurie in Adversary No. 94-4192 (hereinafter "1994 Judgment").

17. Lurie appealed the 1994 Judgment to the District Court, Case No. 4:95CV351. Said appeal was dismissed due to Lurie's failure to file a brief.

18. By Order dated October 21, 1997, pursuant to Motion and a hearing, the 1994 Judgment was revived by this Court. Lurie appealed the revival of the 1994 Judgment to the Bankruptcy Appellate Panel and the Eighth Circuit. Both the Bankruptcy Appellate Panel and the Eighth Circuit affirmed the Order of the United States Bankruptcy Court reviving the 1994 Judgment. Blackwell v. Lurie (In re Popkin & Stern), 1998 Bankr. LEXIS 197, No. 97-6091 EM, slip op. (8th Cir. BAP 1998) (unpublished), affirmed, Blackwell v. Lurie (In re Popkin & Stern), 168 F.3d 494 (8th Cir. 1998) (unpublished).

19. On October 30, 2000, the 1994 Judgment was revived a second time. (Exhibit B, pg. 305) This Order was not appealed by Lurie.

20. Additionally, a partial history of the 1994 Judgment is as follows:

> a. The 1994 Judgment against Lurie was filed as a foreign judgment in City of St. Louis on April 18, 1995. This Judgment has been revived once on April 15, 1998 and again on April 24,

2001. (Exhibit B, pgs. 296 & 301) Lurie never appealed these orders;

b. The 1994 Judgment against Lurie was filed as a foreign judgment in St. Louis County on May 12, 1995. This Judgment has been revived once on April 17, 1998 and again on May 11, 2001. (Exhibit B, pgs. 287 & 292) Lurie never appealed these orders;

c. An execution pursuant to the St. Louis County foreign judgment on real estate was conducted;

d. An execution pursuant to an Arizona domesticated foreign judgment (the 1994 Judgment against Lurie was domesticated in Arizona) on "*Apache Renegades*" artwork was conducted;

e. An execution by way of a Charging Order entered by this Court pursuant to the 1994 Judgment against Lurie on Sustern Investments IV was conducted;

f. An execution pursuant to the 1994 Judgment against Lurie on Luries' wine collection was conducted (the judgment against Nancy Lurie was satisfied just prior to sale);

g. An execution pursuant to the 1994 Judgment against Lurie on Dierdorf & Hart stock and 1772, Inc stock was conducted. This execution resulted in an execution sale of the stock, and was appealed and affirmed by the Eighth Circuit. *Blackwell v. Lurie*, (*In re: Popkin & Stern*), 242 F.3d 376 (8th Cir. 2000).

h. The 1994 Judgment and Nancy Lurie Judgment were merged by this court. Said merger was affirmed by the Eighth Circuit. *In re Popkin & Stern*, 196 F.3d 933 (8th Cir. 1999).

i. Currently there are pending executions on property located in Montana, New Mexico and Wyoming.

21. On June 24, 1999, Nancy Lurie filed a "Motion for Hearing, Accounting and Adjustment" of the 1994 Judgment in this Court. (Exhibit B, pg. 308) In paragraphs 13-17 of her Motion, Nancy Lurie argued that the 1994 Judgment should be adjusted due to the partnership deficiency being less than the outstanding Judgment against Lurie pursuant to the "Line" in the 1994 Judgment. (Exhibit B, pg. 311) This is the same theory that Lurie is now alleging makes the 1994 Judgment contingent, ambiguous, and/or derivative. Nancy Lurie argued that the 1994 Judgment against Ronald Lurie consisted of four (4) pending unsecured claims (May, Shelton, Squires and Lenich), which the Trustee estimated at $100,000.00 each and that these claims were settled after the entry of the 1994 Judgment for $150,000.00; therefore, Nancy Lurie asserted the 1994 Judgment should have been credited or reduced in that amount. (Exhibit B, pgs. 315, 316, 326 & 327) Ronald Lurie's Motions and testimony assert this same allegation. Nancy Lurie also filed two (2) Memorandums in Support of her Motion. (Exhibit B, pgs. 314-330). The Liquidating Trustee filed a Response to the Motion and a Supplemental Memorandum. (Exhibit B, pg. 331-395).

22. On December 1, 1999, an evidentiary hearing was held and all parties were either present or represented by counsel, or both. On December 21, 1999, this Court issued Findings of Fact, Conclusions of Law and Order on Motions before the Court. (Exhibit B, pg. 396-402) This Court found:

(a) Once again that the 1994 Judgment against Ronald Lurie was a full and final non-appealable Judgment;

(b) That Nancy Lurie was barred from relitigating the amount of the 1994 Judgment and the partnership deficiency amount;

(c) That any adjustments or modification to the 1994 Judgment must have been brought by the Luries within one year after said Judgment was entered;

(d) That the Liquidating Trustee may collect One Million One Hundred Twenty-One Thousand Seven Hundred Forty-Three Dollars ($1,121,743.00) plus interest pursuant to the 1994 Judgment.

23. In addition, evidence at the December 1, 1999, hearing proved and this Court found that the deficiency was not less than the 1994 Judgment and the 1994 Judgment was not subject to modification and the 1994 Judgment was unambiguous. (Exhibit B, pgs. 396-402).

24. The four (4) unsecured claims were legal malpractice claims filed against the Popkin & Stern Liquidating Trust. Originally, David Shelton filed an unsecured claim in the amount of $1,000,000.00. (Exhibit C-4(a)). Charles May filed an unsecured claim in the amount of $1,000,000.00. (Exhibit C-4(a)). Squires Way development filed an unsecured claim in the amount of $273,000.00. (Exhibit C-4(a)). William and Deborah Lenich filed an unsecured claim in the amount of $273,000.00. (Exhibit C-4(a)). The Liquidating trustee asserted that these claims were covered by Popkin & Stern malpractice insurer Old Republic. During litigation in regard to coverage of malpractice claims, the Liquidating Trust and Old Republic entered into a

settlement agreement whereby the Liquidating Trust would pay or expend defense costs up to the deductible of the policy $100,000.00 and Old Republic would pay any additional costs.

25. The Liquidating Trustee objected to the claims of Shelton and May. The Shelton and May claims were combined and settled for a lump sum deductible payment by the Liquidating Trust of $100,000.00. (Exhibit C-4(a) and Exhibit B, pgs. 101-103). An additional amount may have been paid by Old Republic, but the Liquidating Trust only had to pay the $100,000.00 deductible.

26. The Liquidating Trustee objected to the claims of Squire's Way and Lenich. The Squire's Way and Lenich claims were combined and settled for a lump sum settlement payment of $50,000.00. (Exhibit C-4(a) and Exhibit B, pgs. 101-103). There may have been some legal expenses incurred by the Liquidating Trust's attorneys shown on the attorney fee bills and Form II's in connection with those claims, but those amounts have not been separately calculated.

27. The reduction of these claims and others are reflected in the financial statements and reduce the Liquidating Trust deficiency. (See, for example, Exhibit D, E & G).

28. Other claims and costs of administration were not included or were under estimated in calculating the 1994 Judgment and may increase or change the liquidating Trust deficiency. (See, for example, Exhibit B, pgs. 332, 333, 382 and 383, Exhibit C-4(a) and C-4(d), Exhibit A, D, E, G, H and I).

29. These additional claims and costs are reflected in the financial statements filed each year and the Form II's

which is a complete accounting of the Liquidating Trust that was filed pursuant to Court Order and admitted by Stipulation into evidence in this matter. (Exhibit A, D, E and G).

30. The Form II's are documents which reflect all income and expenses of the Liquidating Trust from its inception up to the date shown and submitted. (Exhibit A, pg. 2 and Exhibit D)

31. The Liquidating Trustee appropriately credited the 1994 Judgment with amounts collected from executions. (Exhibit F)

32. The 1994 Judgment against Ronald Lurie should not be credited or adjusted based upon differences between the estimated amounts in the calculation of the 1994 Judgment accepted in evidence at the trial in Adversary 94-4192 and the actual amounts determined in later years. Those differences, if any, as set forth above, are reflected in the deficiency calculations.

33. In the September 4, 2001, Order entered by the Bankruptcy Appellate Panel in Case No. 01-6020, the BAP found that the 1994 Judgment is "final and unalterable". (Exhibit B, pg. 409)

34. On March 21, 2002, the Montana Supreme Court found the 1994 Judgment which was domesticated in the State of Montana was a sum certain and the Court allowed executions pursuant thereto. Case No. 01-474: Robert J. Blackwell, Liquidating Trustee of Popkin & Stern Liquidating Trust, Plaintiff/Respondent v. Ronald Lurie, Defendant/Appellant, Nancy Lurie, Michael Lurie and Ryan Lurie, Appellants. (See Liquidating Trustee's Response

filed May 3, 2002 to Ronald Lurie's April Motion at Exhibit D).

35. The 1994 Judgment against Ronald Lurie in the amount of $1,121,743.00 is a final, sum certain judgment. Courts of Appeals have jurisdiction only over appeals from final Judgments. *In re Yukon Energy Corp.*, 138 F.3d 1254 (8th Cir. 1998), Lurie's appeal of his Judgment was dismissed. As previously stated, at least one revival of his Judgment and at least some executions pursuant to his Judgment were appealed to the Eighth Circuit and his theory on those appeals was rejected.

36. The 1994 Judgment against Ronald Lurie is not ambiguous, contingent or derivative.

The Doctrine of Res Judicata holds that a final judgment on the merits is conclusive as to rights of the parties and their privies. *In re Tant*, 156 B.R. 1018 (Bankr. W.D.Mo. 1993) and *Wallingsford v. Larcon Co.*, 237 F.2d 904 (8th Cir. 19560. Res Judicata precludes relitigation of a claim that was raised or could have been raised in the prior action. *Lane v. Peterson*, 899 F.2d 737 (8th Cir. 1990). In 1994, Lurie could have raised the issues he now asserts regarding the validity, finality and ambiguity of the 1994 Judgment and the on [sic] which it is based. He did not. The 1994 Judgment against Lurie was and is a final, sum certain judgment on the merits and Lurie is barred from attempting to relitigate the 1994 Judgment against him.

37. Lurie is also precluded from reiterating the issues posed in his Motions by Collateral Estoppel. Under the Collateral Estoppel Doctrine a "second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and

necessary to the outcome of the first action". *Id. Lane*, citing *Parklane Hosier*, 439 U.S. at 326 n. 5, 99 S.Ct. at 649 n. 5 (1979). See also *In re Scarborough*, 171 F.3d 638 (8th Cir. 1999). This legal doctrine bars Lurie from relitigating factual and legal issues that were determined in the *1994 Adversary* against him, Nancy Lurie's Motion for Accounting and the other actions decided over the past 7 years. *Id. Scarborough.*

38. Lurie's Motion arguments are also barred by the Doctrine of Law of the Case. This Doctrine is a doctrine of discretion. *Little Earth of the United Tribes, Inc., vs. United States Department of Housing and Urban Development*, 807 F.2d 1433 (8th Cir. 1986). "The Doctrine provides that when a court decides a rule of law, that decision should continue to govern the same issue in subsequent stages in the same case." *Id.* Quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). "The Doctrine prevents the relitigation of settled issues in a case, thus protecting the expectations of parties, insuring uniformity of decisions, and prompting judicial efficiency." *Id.* Citing *Liddell v. Missouri*, 731 F.2d 1294, 1304-5 (8th Cir. 1984). The status of the 1994 Judgment is now law of this entire Bankruptcy case. Lurie's Appeal of the 1994 Judgment was dismissed. The fact that the 1994 Judgment against Ronald Lurie was and is valid, final, unambiguous, liquidated and sum certain is a settled issue in the Popkin & Stern Bankruptcy Case.

39. The Liquidating Trustee has provided a comprehensive accounting.

40. The extensive accounting and supplemental accounting supplied herein were not required to be compiled in

the ordinary course of the Liquidating Trust, but were provided in response to this Court's orders.

41. Among other documentation in the exhibits stipulated into evidence, the accounting includes a report of all assets and all expenses paid, and a Form II that is a complete report of all monies received and paid. (Exhibit D)

42. On March 11, 1996, 8182 Maryland Associates, Limited Partnership (hereinafter "8182 Maryland") obtained a judgment against Ronald Lurie in the Circuit Court of the County of St. Louis, States [sic] of Missouri in the amount of $3,574,042.60. (Liquidating Trustee's May 3, 2002, Response to Lurie's April Motion at Exhibit A).

43. On April 9, 1996, the County Court issued a Certification of Final Judgment indicating that the judgment against Ronald U. Lurie was final for purposes of appeal. The certification provides that the judgment "is final for purposes of appeal in that while this case involves multiple parties, the attached judgment finally disposes of all of the claims against defendant Ronald U. Lurie, and because all other parties have either been dismissed or have had a stay of action entered as a result of their participation in a bankruptcy discharge plan, there is no reason for delay in entry of a Final Judgment on the Judgment." (Liquidating Trustee's May 3, 2002, Response to Lurie's April Motion at Exhibit C).

44. The 8182 Maryland judgment against Ronald Lurie is presently due and owing in an amount in excess of $3,000,000.00. (Exhibit I)

45. 8182 Maryland has an allowed and outstanding claim in the Popkin & Stern bankruptcy Estate of $976,806.02. (Exhibit C-4(d))

46. The 1994 Judgment against Ronald Lurie is a Liquidating Trust Asset as defined by the Second Amended Plan of Reorganization and the Liquidating Trust.

47. In collecting the 1994 Judgment against Ronald Lurie, the Liquidating Trustee is operating pursuant to authority granted under the Liquidating Trust Second Amended Plan.

48. Collection of the 1994 Judgment is a duty of the Liquidating Trustee pursuant to the Liquidating Trust Agreement.

49. Pursuant to the Liquidating Trust Agreement, the Liquidating Trustee is authorized to employ attorneys as he deems necessary or desirable to fulfill his duties, including the duty to collect amounts due from Lurie under the 1994 Judgment.

50. The Liquidating Trustee is further authorized to pay such attorneys reasonable compensation and reimbursement of expenses from the Liquidating Trust Assets.

51. Under the terms of the Second Amended Plan, monies (proceeds) collected from Lurie on account of the 1994 Judgment are Liquidating Trust Assets (Exhibit B, pg. 109) and are therefore available for payment of attorney's fees incurred by professionals hired by the Liquidating Trustee to assist in the collection of the 1994 Judgment.

52. Under the terms of the Trust Agreement, no Court approval is required for fees and expenses incurred by attorneys for the Liquidating Trustee pursuant to the terms of the Trust Agreement.

53. Under the terms of the Trust Agreement, the Court need not evaluate the requested professional fees of the Trustee under the standards of 11 U.S.C. § 330; rather the Court's role is limited to determining that whether the fees and expenses of the Liquidating Trustee's attorneys are reasonable.

54. The Liquidating Trust deficiency amount as of June 7, 2002 is $977,978.00. (Exhibit G)

55. This deficiency amount does not include administrative expenses incurred but not yet paid. These expenses would increase, not decrease, the amount of the deficiency.

56. The outstanding amount due and owing pursuant to the 1994 Judgment against Ronald Lurie as of June 17, 2002, is $793,294.34. (Exhibit F)

57. While expenses and other events may cause a change in the deficiency when they occur and/or are reported, the deficiency exceeds the amount owing on the 1994 Judgment.

58. The Liquidating Trustee has incurred reasonable attorney's fees in the amount of $14,224.50 for preparation of the accounting and supplemental accounting. (Exhibit H)

59. The Liquidating Trustee has incurred reasonable attorney's fees in the amount of $12,955.00 for defense of Lurie's October and April Motions. (Exhibit H)

To the extent that the foregoing Findings of Fact shall state Conclusions of Law, they shall also be deemed Conclusions of Law.

The Court hereby makes the following Conclusions of Law:

1. The 1994 Judgment entered against Ronald U. Lurie and in favor of Robert J. Blackwell as Liquidating Trustee of the Popkin & Stern Liquidating Trust is final, sum certain and unalterable.

2. The 1994 Judgment bears interest from October 20, 1994 in accordance with 28 U.S.C. § 1961.

3. The outstanding amount due and owing on the 1994 Judgment is subject to execution and collection proceedings.

4. The 1994 Judgment is not contingent nor is the 1994 Judgment derivative.

5. The fact that estimates were included in the calculation of the amount of the 1994 Judgment does not change the status of the 1994 Judgment as one that is final, sum certain and unalterable.

6. The evidence at this hearing does not support credit or reduction in the outstanding amount due and owing on the 1994 Judgment.

7. The outstanding amount of the 1994 Judgment as of June 17, 2002 is $793,294.34.

8. The Liquidating Trust deficiency amount as of June 17, 2002 was a minimum of $977,978.00.

9. On June 17, 2002 8182 Maryland Associates, L.P. had an outstanding allowed unsecured claim against the

Popkin & Stern Liquidating Trust in the amount of $976,806.02.

10. Neither the Certification of Final Judgment entered by the St. Louis County Court nor the underlying judgment obtained by 8182 Maryland against Ronald Lurie disposed of, relinquished, or extinguished the allowed claim of 8182 Maryland against the Popkin & Stern Liquidating Trust. The language in the certification indication that the judgment "finally disposes of all of the claims against defendant Ronald U. Lurie" rendered such judgment final for purposes of appeal notwithstanding the fact that no final judgment had been entered against all other defendants in such action. The judgment had no impact on the validity of 8182 Maryland's claim against the bankruptcy estate. The County Court judgment is an alternate avenue of collection for 8182 Maryland wherein it is not subject to the monetary limitation imposed by Section 502(b)(6) of the Bankruptcy Code. Indeed, 8182 Maryland has credited amounts collected from the Popkin & Stern Liquidating Trust against the outstanding amount of the judgment against Lurie as well as the unpaid amount of its allowed claim, as reflected in the affidavit of its accountant which was received into evidence by stipulation as Exhibit I.

11. The deficiency of the Popkin & Stern Liquidating Trust includes all allowed claims, fees, expenses, administrative expenses and costs of collections incurred by the Liquidating Trustee in performance of his duties.

12. The Liquidating Trustee is authorized to take any lawful action necessary including executions to collect assets of the Liquidating Trust.

13. Proceeds of the 1994 Judgment are a Liquidating Trust Asset (and therefore the 1994 Judgment is an Asset) and the collection of amounts due thereunder is a duty of the Liquidating Trustee pursuant to the Liquidating Trust Agreement dated September 10, 1993.

14. The Liquidating Trust the [sic] sum of $14,224.50 as and for the reasonable costs of the accounting and supplemental accounting requested incurred by the Trustee shall be added to the judgment against Ronald Lurie and in favor of the liquidating Trustee.

15. The sum of $12,955.00 as and for reasonable attorneys fees incurred by the Trustee in the defense of the April and October Motions incurred by the Liquidating Trustee shall be added to the judgment.

To the extent the foregoing conclusions of law shall state findings of fact, they shall also be deemed findings of fact.

Accordingly, for the reasons set forth above, it is hereby Ordered that all relief requested in Ronald Lurie's October and April Motions are denied.

July 19, 2002.

JUDGE BARRY S. SCHERMER

UNITED STATES BANKRUPTCY JUDGE

In re: Popkin & Stern, Debtor. Robert J. Blackwell, Liquidating Trustee of the Popkin & Stern Liquidating Trust, Plaintiff-Appellee, v. Nancy Fendell Lurie Defendant, Ronald U. Lurie, Interested Party-Appellant.

No. 01-6020EM

UNITED STATES BANKRUPTCY
APPELLATE PANEL FOR THE EIGHTH CIRCUIT

266 B.R. 146; 2001 Bankr. LEXIS 1067; 38 Bankr. Ct. Dec. 92; 50 Fed. R. Serv. 3d (Callaghan) 599

July 5, 2001, Submitted
September 4, 2001, Filed

COUNSEL: For ROBERT J. BLACKWELL, Plaintiff-Appellee: Serall Chezem, BLACKWELL & ASSOCIATES, O'Fallon, MO.

RONALD U. LURIE, Interested Party-Appellant, Pro se, Bozeman, MT.

JUDGES: Before KOGER, KRESSEL, and DREHER, Bankruptcy Judges.

OPINION BY: DREHER

OPINION:

DREHER, Bankruptcy Judge.

Ronald U. Lurie ("Lurie") appeals from portions of the bankruptcy court's order of March 6, 2001. For the reasons set forth below, we reverse.

FACTS and PROCEDURAL HISTORY

A. The Popkin & Stern Bankruptcy

This dispute arises in the bankruptcy case of Popkin & Stern, a St. Louis law firm ("Debtor"). Lurie was a general and managing partner of the firm. Debtor's bankruptcy case was commenced on March 26, 1992 by the filing of an involuntary petition. Debtor then converted the case to one under chapter 11 and Appellee Robert Blackwell ("Blackwell") was appointed trustee.

On August 27, 1993, the bankruptcy court confirmed Debtor's proposed plan of reorganization. That plan provided for the creation of a liquidating trust to collect Debtor's assets and distribute them to creditors pursuant to the terms of the plan. The plan further provided that Blackwell would be the trustee of the liquidating trust.

B. The Adversary Proceeding Against Lurie

As part of his duties as the liquidating trustee, Blackwell sued Lurie under Section 723 of the Bankruptcy Code. On October 20, 1994, the bankruptcy court entered a judgment in favor of Blackwell and against Lurie for $1,121,743.00 ("the Lurie judgment"). The Lurie judgment was for the estimated deficiency to be assessed against Lurie, as a partner of Debtor. It also provided that if the amount of the deficiency was ultimately determined to be less than the amount of the judgment, "the Liquidating Trustee shall move this court to reduce this judgment." It is this quoted language that serves as the basis of Lurie's current appeal. Lurie appealed from the Lurie judgment, but his appeal was dismissed for failure to prosecute.

On October 2, 1997, at the request of Blackwell, the bankruptcy court issued an order reviving the judgment.[1] Lurie also appealed from this order. The order reviving the Lurie judgment was subsequently affirmed by both the Bankruptcy Appellate Panel and the Eighth Circuit Court of Appeals. *Blackwell v. Lurie* (*In re Popkin & Stern*), 1998 Bankr. LEXIS 197, No. 97-6091EM, slip op. (B.A.P. 8th Cir. 1998) (unpublished), *aff'd, Blackwell v. Lurie* (*In re Popkin & Stern*), 168 F.3d 494 (8th Cir. 1998) (unpublished). On October 30, 2000, again at the request of Blackwell, the bankruptcy court issued a second order reviving the Lurie judgment. Lurie did not appeal this order.

Blackwell has since filed and executed on the Lurie judgment in numerous jurisdictions. He has also obtained at least one charging order from the bankruptcy court allowing him to execute against certain separately held assets of Lurie.

C. The Adversary Proceeding Against Nancy Lurie

As part of his attempts to gather assets of Popkin & Stern, Blackwell also commenced a separate adversary proceeding against Nancy Lurie, Lurie's wife. Blackwell claimed that Nancy Lurie was the recipient of numerous fraudulent transfers. Lurie was not a party to this action. Blackwell obtained a judgment against Nancy Lurie in the amount of $352,300.95, plus interest ("Nancy's judgment"). This judgment explicitly provides that it is merged for

[1] Prior to the 2001 amendments, Missouri judgment liens survived only 3 years. MO. REV. STAT. § 511.360.

execution purposes with the Lurie judgment, but that Blackwell is only entitled to execute on assets jointly owned by Nancy Lurie and Lurie up to the amount of Nancy's judgment. To recover the remainder of the Lurie judgment, Blackwell would have to find assets owned by Lurie separately.

In the early stages of the case against Nancy Lurie, at Lurie's request, the bankruptcy court issued an order dated February 21, 1995, which enjoined, until further order of the court, sale by anyone, including the Luries and Blackwell, of certain artwork and a wine collection ("the freeze order"). In late 1999, the freeze order became the subject of several motions and counter motions. Blackwell moved to lift the freeze order on the wine collection so as to allow him to execute on it. Nancy Lurie countered with her own motion for an accounting from the Trustee regarding how he had applied sums collected from execution on the two judgments. Nancy Lurie also sought a reduction of the Lurie judgment pursuant to the language quoted above which called for an adjustment depending upon how the partnership bankruptcy resolved.

On December 1, 1999, the bankruptcy court convened a hearing to resolve these several pending motions. Subsequently, on December 21, 1999, the court issued an order in which it found that the Lurie judgment was a full and final judgment no longer subject to appeal. The court also held that the time to move for relief from the Lurie judgment under Bankruptcy Rule 9024 (incorporating FED. R. CIV. P. 60) had passed, that the Lurie judgment was final, and the amount of the judgment was not subject to reduction. The court also found that Nancy Lurie was collaterally estopped and did not have standing to challenge the Lurie judgment. There is, however, nothing in the record

indicating that Lurie appeared, was represented, or participated in any of these proceedings. He was certainly not a party.

In the summer of 2000, the judgment against Nancy Lurie was fully satisfied. She then sought an order from the bankruptcy court lifting the freeze order on two pieces of artwork, one located in New Mexico and the other in Wyoming, both of which were jointly owned by the Luries. She argued that, since the liquidating trustee had satisfied his judgment against Nancy Lurie, he was no longer entitled to execute on jointly owned property. Blackwell filed a response in which he argued that state law controlled and that the freeze order should be lifted to allow him to execute on it because, under applicable state law, the property would not be considered jointly owned. As part of a supplemental response he also, for the first time, raised a totally extraneous issue. Blackwell requested the bankruptcy court to reiterate the finding it had made in its order of December 21, 1999, to the effect that the Lurie judgment was final, unappealable, and not subject to reduction. Blackwell was having problems in Montana executing against property unrelated to the property at issue in the motion because Lurie was arguing to the Montana state court that the Lurie judgment was ambiguous. Blackwell asked the bankruptcy court to include language in the order on the pending motion that would make clear, once again, and he hoped once and for all, that the judgment against Lurie was final and was not subject to reduction. Blackwell urged that reduction was no longer an option because the bankruptcy court had issued a final nonappealable judgment in 1994, had issued two orders reviving the judgment, and had issued its December 19, 1999, order in Nancy Lurie's proceeding.

The court held a hearing on February 26, 2001. Blackwell and Nancy Lurie were represented by counsel. Lurie, who had been served with the supplemental response, appeared by telephone, but did not file a response to the motion nor state a position on the record. Apparently, the bankruptcy court had much earlier required Lurie be served and appear in all proceedings in Nancy Lurie's case, presumably for the purpose of making sure Lurie was aware of what was happening in Nancy Lurie's case. The hearing on this date also covered other matters which Lurie did respond to. However, nothing in the record suggests that Lurie was ever joined as a party or intervened in the adversary proceeding involving Nancy Lurie.

On March 6, 2001, the bankruptcy court issued the order appealed from, in which it denied the motion by Nancy Lurie to lift the freeze order and granted the Trustee's request to proceed with an execution against the artwork (indeed, against all assets generally). In that portion of the order from which Lurie appeals, the bankruptcy court ordered in, in part:

> that the October 20, 1994 Judgment in favor of the Liquidating Trustee against Ronald Lurie for One Million One Hundred Twenty-One Thousand Seven Hundred Forty-Three Dollars ($1,121,743.00) is a full and final non-appealable and non-modifiable judgment which allows the Liquidating Trustee to execute on any and all property in order to enforce and/or collect said judgment.

And, in the next paragraph the court went on to order:

> that Ronald Lurie, Nancy Lurie, Michael Lurie and Ryan Lurie are barred by collateral estoppel and res judicata to challenge either the October

20, 1994 Judgment against Ronald Lurie or the Popkin & Stern deficiency amount.

DECISION

Lurie does not take issue with the bankruptcy court's decisions regarding the freeze order. Rather, he vigorously contends that the bankruptcy court erred in holding that the Lurie judgment was final, not subject to reduction, and not subject to his collateral attack. He advances a number of arguments as to why the judgment against him was erroneous at the onset and is, at a minimum, ambiguous. He asserts that this court should reverse and remand so that the bankruptcy court can address his continuing assertions that the original amount of the judgment against him must be reduced because, as facts have developed, the deficiency is much less than originally anticipated. He also wants this court to require an accounting from the trustee of collections, allocations and disbursements on the judgment. He contends that until the judgment is reduced to a sum certain it cannot serve as the basis for a valid execution. He also asserts that we should reverse the bankruptcy court because Lurie was not a party to the Nancy Lurie adversary proceeding in which the appealed from order was issued and the court made its determination regarding the finality of the Lurie judgment even though no motion to affirm, modify or alter the judgment against him had been made.

Blackwell responds that the bankruptcy court properly held that the Lurie judgment was unalterable. He points to the failure to effectively appeal the judgment in the first place, the history of several revivals, the many steps that he has successfully taken to execute on the judgment, and the December 21, 1999 order in Nancy

Lurie's case. He argues that Lurie is not free to contend that the Lurie judgment needs to be clarified, citing res judicata, collateral estoppel, and law of the case. He also asserts that even though no motion was made, Lurie was served with the responsive papers, did nothing, and cannot now argue the merits on appeal.

In his Reply Brief, Lurie takes a different tack. He contends that the bankruptcy court's order modified the Lurie judgment. While he concedes that the judgment was final and cannot be altered, he asserts that it is ambiguous, subject to adjustment, and that the bankruptcy court improperly modified it by making it not subject to adjustment.

We begin with three unassailable propositions: 1) Lurie was not a party to Nancy Lurie's adversary proceeding and he did not participate in the proceedings, either in writing or orally; 2) the issue of reiterating the finality and inalterability of the Lurie judgment was not joined in the proceedings and no motion had been made to alter or amend it; and 3) in the absence of such a motion, the judgment is final and unalterable. Nonetheless, we conclude that although Lurie was not a party to the case, he has standing to appeal from the order. We also conclude that as a nonparty, the bankruptcy court lacked personal jurisdiction over Lurie and he is not bound by the March 6, 2001 order of the court.

A. Standing

On appeal the issue of standing was not raised by Lurie or Blackwell, but is essential to the court's consideration of the appeal. If Lurie does not have standing, then this court does not have jurisdiction to decide any other

issues raised on appeal. *United States DOJ v. Mandanici (In re Starr)*, 152 F.3d 741, 747 (8th Cir. 1998) (citing *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998) ("'Without jurisdiction the court cannot proceed at all in any cause.'") (quoting *Ex parte McCardle*, 74 U.S.(Wall.) 506, 514, 19 L. Ed. 264 (1868))). Standing is an element of federal subject matter jurisdiction which cannot be waived and may be raised at any time by a party or by the court.[2] *See, e.g., Magee v. Exxon Corp.*, 135 F.3d 599, 601 (8th Cir. 1998); *Berger Levee Dist. v. United States*, 128 F.3d 679, 680 (8th Cir. 1997); *Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 485 (8th Cir. 1993). We determine our own jurisdiction, including the appellant's standing, *sua sponte. National Org. for Women, Inc. v. Scheidler,* 510 U.S. 249, 255, 127 L. Ed. 2d 99, 114 S. Ct. 798 (1994). Although neither Lurie nor Blackwell seek [sic] dismissal for lack of jurisdiction, the Court has an independent obligation to conduct this jurisdictional inquiry. *See Lewis v. United States*, 992 F.2d 767, 771 (8th Cir. 1993); *Crockett v. Lineberger*, 205 B.R. 580, 581 n.3 (B.A.P. 8th Cir. 1997).

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[2] In *Williams v. Marlar (In re Marlar)*, 252 B.R. 743, 748 (B.A.P. 8th Cir. 2000) the bankruptcy appellate panel discussed the differences between Article III standing and standing in bankruptcy court. In *Cult Awareness Network, Inc. v. Martino (In re Cult Awareness Network, Inc.),* 151 F.3d 605, 607-08 (7th Cir. 1998), the Seventh Circuit Court of Appeals opined that bankruptcy standing is narrower than Article III standing. *Compare Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) (describing Article III standing) *with In re Andreuccetti,* 975 F.2d 413, 416 (7th Cir. 1992) (describing bankruptcy standing). Only those persons affected pecuniarily by an order have standing to appeal. *In re Marlar,* 252 B.R. at 748.

Generally, those who were not parties before the bankruptcy court may not appeal an order of the bankruptcy court. Clearly, Lurie is a nonparty to Nancy Lurie's adversary proceeding. In order to appeal from the order, therefore, he must have a stake in the outcome of the bankruptcy proceedings, which is "discernable from the record." *Binker v. Pennsylvania,* 977 F.2d 738, 745 (3d Cir. 1992) (citing *EEOC v. Pan American World Airways, Inc.,* 897 F.2d 1499 (9th Cir. 1990), *cert. denied,* 498 U.S. 815 (1990)). "Ordinarily, a party to a lawsuit has no standing to appeal an order unless he can show some basis for arguing that the challenged action causes him a cognizable injury, i.e., that he is 'aggrieved' by the order." *Yukon Energy Corp. v. Brandon Invs., Inc. (In re Yukon Energy Corp.),* 138 F.3d 1254, 1259 (8th Cir. 1998) (quoting *Spencer v. Casavilla,* 44 F.3d 74, 78 (2d Cir. 1994)); *Rodney v. Piper Capital Mgmt. (In re Piper Funds),* 71 F.3d 298, 301 (8th Cir. 1995) (noting that equitable considerations clearly warrant giving standing to appeal to a nonparty that has been "haled . . . into district court despite [its] objections.") (quoting *S.E.C. v. Wencke,* 783 F.2d 829, 834 (9th Cir.), *cert. denied,* 479 U.S. 818 (1986)).

The issue of whether Lurie is a person "aggrieved" by the order of the bankruptcy court is a question of fact. *Fidelity Bank v. M.M. Group. Inc.,* 77 F.3d 880, 882 (6th Cir. 1996). In this case, Lurie is "aggrieved." The bankruptcy court's order from which Lurie appeals imposes an obligation upon him. Under the terms of paragraph 3 of the bankruptcy court's order the Lurie judgment "is a full and final nonappealable and non-modifiable judgment which allows the Liquidating Trustee to execute on any and all property in order to enforce and/or collect said judgment." Pursuant to paragraph 4 Lurie is "barred by

collateral estoppel and res judicata to challenge either the October 20, 1994 Judgment against Ronald Lurie or the Popkin & Stern deficiency amount."

A fair inference from such an order is that the court might exercise its powers, including its contempt power, to enforce its order and punish noncompliance. *See Gardiner v. A.H. Robins Co., Inc.* 747 F.2d 1180, 1187 n.8. (8th Cir. 1984) (citing *Smith v. Eggar,* 655 F.2d 181, 184-85 (9th Cir. 1981)). The order could be interpreted as an injunction against Lurie, preventing him from seeking a reduction in the deficiency amount, and not merely a statement of fact by the court. "[W]here a non-party is purportedly bound by an injunction, the non-party may bring an appeal rather than face the possibility of a contempt proceeding." *Hilao v. Estate of Marcos* (*In re Estate of Marcos Human Rights Litig.*), 94 F.3d 539, 544 (9th Cir. 1996). *See also In re Piper Funds, Inc.,* 71 F.3d at 301 ("A nonparty normally has standing to appeal when it is adversely affected by an injunction."). The bankruptcy court has the power to find Lurie in either criminal or civil contempt for violation of its order. *See Brown v. Ramsay* (*In re Ragar*), 3 F.3d 1174, 1179 (8th Cir. 1993); 11 U.S.C. § 105. Even if the bankruptcy court's order was later found to be void for lack of personal jurisdiction, the risk to Lurie of being the subject of a contempt proceeding is too great. *See Gardiner,* 747 F.2d at 1188. He is "aggrieved" by being subjected to such a risk. Having found that Lurie is "aggrieved" by the bankruptcy court's March 6, 2001 order we conclude that he does have standing to appeal. *See In re Ferren,* 227 B.R. 279, 282 (B.A.P. 8th Cir. 1998), *aff'd, Ferren v. Searcy Winnelson Co.* (*In re Ferren*), 203 F.3d 559 (8th Cir. 2000).

B. Personal Jurisdiction

Once standing is determined, the issue of the bankruptcy court's personal jurisdiction of Lurie must be resolved. The bankruptcy court must have jurisdiction over those persons subject to its orders. Personal jurisdiction is an essential element of bankruptcy court jurisdiction, without which the court may not proceed to an adjudication. *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 584, 143 L. Ed. 2d 760, 119 S. Ct. 1563 (1999) (citing *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382, 81 L. Ed. 289, 57 S. Ct. 273 (1937)). Without personal jurisdiction, any order the bankruptcy court enters against Lurie is void. *See U.S. v. Kirschenbaum,* 156 F.3d 784, 795 (7th Cir. 1998).

Lurie has the right to insist that the bankruptcy court have personal jurisdiction over him before submitting to the authority of the court. He may forgo that right, effectively consenting to the court's exercise of adjudicatory authority. *See* FED. R. BANK. P. 7012 incorporating FED. R. CIV. P. 12(h) 10(1) (defense of lack of jurisdiction over the person can be waived). However, nothing in the record suggests that Lurie waived personal jurisdiction. The service of Lurie by the Trustee of the supplemental response and Lurie's appearance by telephone does not make him a party to the proceeding. He did not file a response to the motion nor was he asked to state a position on the record. Although Lurie had an ownership interest in the property subject to the court's freeze order and may have intervened, he did not. Lurie is not appealing the lifting of the freeze order, only the extraneous order of the bankruptcy court regarding the status of the Lurie judgment. The status of that judgment and specifically, whether the judgment should be or could be altered, amended or

clarified can only be made by motion brought by the Trustee in the action against Lurie, not in Nancy Lurie's case.

Lurie is clearly not a party to Nancy Lurie's adversary proceeding. Therefore, the bankruptcy court lacked personal jurisdiction of Lurie and the court's March 6, 2001 order is void as it applies to Lurie. Having determined that the bankruptcy court did not have personal jurisdiction of Lurie in the Nancy Lurie adversary proceeding, all other issues presented on appeal are moot.

ACCORDINGLY, we reverse that part of the March 6, 2001 order to the extent that it purports to bar Ronald U. Lurie from challenging the Lurie judgment.

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:	)	**Chapter 11**
POPKIN & STERN,	)	**Case No. 92-42218-293**
ROBERT BLACKWELL,	)	
Plaintiff,	)	**Adv. No. 94-4192**
	)	
vs.	)	
	)	
RONALD U. LURIE,	)	
Defendant.	)	
	)	

JUDGMENT IN FAVOR OF PLAINTIFF, LIQUIDATING TRUSTEE AND AGAINST DEFENDANT RONALD U. LURIE ON COMPLAINT TO RECOVER DEFICIENCY PURSUANT TO 11 U.S.C. §723

Based upon the findings of fact and conclusions of law made concurrently and for good cause, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

1. Plaintiff Robert J. Blackwell, in his capacity as Liquidating Trustee, shall have judgment against Lurie on Count I of the Complaint in the amount of One Million One Hundred Twenty-One Thousand Seven Hundred and Forty-Three Dollars ($1,121,743.00) plus interest from the date of entry of judgment at the rate provided by 28 U.S.C. §1961.

If the amount of the deficiency is ultimately determined to be less than the amount of this judgment, the

Liquidating Trustee shall move this Court to reduce this judgment.

2. Claim for Relief Numbers II and III of the Liquidating Trustee's Complaint are dismissed with prejudice.

3. The Claim for Relief in the Counterclaim is dismissed with prejudice.

DEFICIENCY CALCULATION

PROPERTY OF ESTATE		
Cash on hand	$	500,059
Notes Payable		
First Notes (principal)		1,125,711
Second Notes (principal)		7,432
Interest on First and Second		173,642
Other Assets		
Accounts Receivable (see Note 2)		-0-
Sustern IV		20,000
Causes of Action[1]		1,283
TOTAL ASSETS	$	1,828,127
CLAIMS AGAINST ESTATE		
Allowed unsecured claims (balance due)	$	2,078,488
Admin. fees & expenses		
Blackwell & Bertsch (5/3/94-9/1/94)		48,386
Estimated additional fees & exp.		200,000
Liquidating Trustee (1/1/94-7/1/94)		10,624
Estimated additional comm.		35,000
Accountant (4/1/94-7/1/94)		10,372
Estimated additional fees & exp.		75,000
Datastor		12,000

Pending unsecured claims

Claimant	Filed Amt.	Est. for deficiency
Chesterfield Fin.	$ 115,258	$ 80,000
Chas. May	1,347,000	100,000
David Shelton	1,347,000	100,000
Squires Way Dev. Co.	273,000	100,000
Wm. & Deb. Lenich	273,000	100,000

Secured Claim

First Bank[2]		-0-
	TOTAL LIABILITIES	$ 2,949,870
	DEFICIENCY	$ 1,121,743

[1] Liquidating Trustee's complaint pending against Larry Bull for fraudulent transfer in the amount of $1,283.25. Liquidating Trustee's complaints for preferential transfers, pursuant to 11 U.S.C. §547, are not included (complaint against Lurie's Home Supply Center, Inc. in the amount of $14,128 and complaint against Evans & Dixon in the amount of $2,000) because defendants' would have a resulting claim in the same amount paid to the Liquidating Trust.

[2] Pre-petition balance due First Bank = $289,162.53; First Bank holds a valid and perfected lien and security interest in Debtor's accounts receivable; value of remaining accounts receivable estimated at $291,945; however, First Bank's post-petition interest and expenses = $332,339.36. Therefore, for purposes of determining the deficiency, First Bank's claim is listed as -0- and value of accounts receivable securing First Bank's secured claim are listed as -0-.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:	)	**Chapter 11**
POPKIN & STERN,	)	**Case No. 92-42218-293**
ROBERT BLACKWELL,	)	
Plaintiff,	)	**Adv. No. 94-4192**
vs.	)	
RONALD U. LURIE,	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON COMPLAINT TO RECOVER DEFICIENCY PURSUANT TO 11 U.S.C. §723

The Complaint filed by Plaintiff Robert J. Blackwell, the Liquidating Trustee under the Liquidating Trust created pursuant to the confirmed plan of reorganization in the Popkin & Stern ("P&S") Bankruptcy Case, came on for trial on September 25, 1984. Appearances were: Spencer Desai of Blackwell & Bertsch for the Liquidating Trustee; Neil H. Miller and Deborah A. Weedman for Plaintiff in Intervention, 8182 Maryland Associates, Limited Partnership, ("Maryland Associates"); and Robert L. Devereux[1] of Devereux, Murphy,

[1] Dennis J. Dobbels of Polsinelli, White, Vardeman & Shalton represented Lurie in this adversary proceeding until shortly before trial. The firm moved to withdraw based on Lurie's non-payment of fees, and Lurie did not oppose the motion. When the Court granted the motion to withdraw it advised Lurie that, based upon Lurie's failure to oppose the motion to withdraw and Lurie's status as an experienced

(Continued on following page)

Striler & Brickey, L.L.C. for Defendant Ronald U. Lurie, ("Lurie").

Pursuant to a stipulation among the Liquidating Trustee, Maryland Associates and Lurie and pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure made applicable to this adversary proceeding by Rule 7065 of the Rules of Bankruptcy Procedure, the hearing on the Liquidating Trustee's Motion for Interim Relief Pursuant to Terms of Confirmed Plan of Reorganization and Participant Partner Settlement Agreement etc., conducted on June 2, 1994, was consolidated with the trial of this adversary proceeding.

Based on the pleadings in this adversary action, papers filed in the P&S Bankruptcy Case, evidence received at the June 2, 1994 hearing on the Liquidating Trustee's Motion for Interim Relief Pursuant to Terms of Confirmed Plan of Reorganization and Participant Partner Settlement Agreement and the evidence at trial, *the Court makes the following findings*[2] *of fact*:

1. P&S was a law firm that operated in Clayton, Missouri. Lurie was a general partner of P&S for several years preceding the firm's cessation of business on September 30, 1991. During 1991, Lurie served as

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attorney, the withdrawal and its ramifications would not prompt the Court to continue the trial. Lurie acted as his own attorney for a few days before employing Mr. Devereux's firm.

[2] The Court also adopts certain of the findings of fact made after the June 2, 1994 hearing that has been consolidated with the trial. Those findings are reiterated here based upon all of the evidence at the June 2, 1994, hearing as well as the September 26, 1994 trial. For ease in review, those earlier findings are italicized in this document.

managing partner of P&S. On September 3, 1991, Lurie was elected to a three member liquidating committee to oversee the liquidation of the firm's assets.

2. On March 26, 1992, an involuntary Chapter 7 petition for relief was filed against P&S. The firm elected to convert the case to Chapter 11 and, on May 4, 1992, Robert J. Blackwell, by consent, was appointed as Chapter 11 trustee. P&S named Lurie as one of two designated representatives of the partnership for purposes of the bankruptcy case.

3. During the course of the Chapter 11 case, it became apparent the partnership assets would be insufficient to pay the creditors. As described by P&S in its Disclosure Statement, the deficiency between the partnership assets and liabilities was "substantial". Because the partners may have been jointly and severally liable for such deficiency, the partners started discussing the basis upon which each partner would contribute to a fund to be used to satisfy the claims of creditors.

4. In September, 1992, P&S filed a Complaint for Injunctive Relief in the Bankruptcy Court seeking to enjoin several lawsuits then pending from proceeding against P&S partners.

5. P&S's Complaint for Injunctive Relief alleged that certain partners, identified as the "Sponsoring Partners", had formulated a plan of reorganization. The Complaint alleged that the Sponsoring Partners agreed to contribute money to a plan of reorganization as a way of paying P&S's creditors. The Sponsoring Partners filed financial statements with P&S's Chapter 11 trustee to "protect the interests of the creditors of P&S . . . ".

6. Lurie was a Sponsoring Partner. Lurie submitted a financial statement to the Chapter 11 trustee, which financial statement was made available to creditors willing to sign a confidentiality agreement. The financial statement submitted by Lurie was signed on August 31, 1992, but purports to reveal his financial condition as of July 31, 1992.

7. As part of its effort to prepare for the preliminary injunction hearing on P&S's motion asking the Court to enjoin Maryland Associates from prosecuting a St. Louis County Circuit Court action against the Sponsoring Partners, Maryland Associates conducted the depositions of the Sponsoring Partners, including the deposition of Lurie on October 13, 1992. Maryland Associates also subpoenaed financial statements submitted to P&S's secured lender, First Bank, including the financial statement submitted by Lurie dated January 8, 1991.

8. At trial, this Court granted P&S's Complaint for Injunctive Relief, temporarily staying all litigation against the partners of P&S to allow the partners sufficient time to formulate a consensual plan of reorganization with the law firm's numerous creditors.

9. P&S reached agreement with its major creditors and ultimately confirmed, by Order of this Court entered August 27, 1993, a plan of reorganization (the "Plan").

10. An integral component of the Plan was the creation of a fund to pay claims of the law firm's creditors (the "Liquidating Trust"). Certain partners of P&S, including Lurie, agreed to make payments, over a period of up to six years, to the Liquidating Trustee. The monies contributed to the Liquidating Trust are distributed pro-rata to the creditors holding allowed claims against P&S.

11. Robert J. Blackwell was appointed Liquidating Trustee under the Plan.

12. Lurie agreed to contribute $361,704.00 to the Liquidating Trust. The terms and conditions relating to his contribution are set forth in the Plan, a First Participant Settlement Note executed August 21, 1993 ("First Note"), a Second Participant Settlement Note executed August 21, 1993 ("Second Note") and a deed of trust executed August 27, 1993 wherein Lurie and Nancy Lurie, Lurie's wife, secured the obligations under the First Note, Second Note and Participant Settlement Agreement by granting a deed of trust to the Liquidating Trustee on their residence located at #1 Deacon Drive, St. Louis, Missouri.

13. The default provisions contained in the Participant Settlement Agreement and the Plan were heavily negotiated by the participating partners and creditors. The purpose of the default provisions is to give Lurie and all participating partners incentive to perform their respective obligations.

14. The default provisions contained in the Participant Settlement Agreement and the Plan are clear and unambiguous.

15. The Liquidating Trustee recorded the deed of trust with the St. Louis County Recorder of Deeds on November 12, 1993.

16. The Plan provides (i) that each partner contributing to the Liquidating Trust (termed a "Settling Participant") would receive a release from creditors of any and all claims relating to the liabilities of P&S, and (ii) that an injunction would be issued to enforce said release.

17. Paragraph 5.2(a) of the Plan states:

> *"(a) Any default under the Participant Settlement Agreement shall vitiate the releases given to the Settling Participant under the Plan (but only as to the defaulting Settling Participant and not as to other Settling Participants that are not in default of their obligations under their Participant Settlement Agreement; releases given by the defaulting Settling Participants to Released Parties shall remain in full force and effect, except for defensive purposes as set forth below and shall reinstate the defaulting Settling Participant's liability, if any, to the Debtor's creditors for the Debtor's obligations, subject to any defenses, claims and counterclaims that such defaulting Settling Participant may have (and subject to the provisions of Section 5.2(a) below) (such defense and counterclaims shall be solely for the purpose of offset against the defaulting Settling Participant's liability and for no other purpose, including any affirmative recovery against any Released Party) provided however, that any payments previously made by such defaulting Settling Participant shall not be returned to such defaulting Settling Participant, and further provided that no creditor shall be allowed to recover more than the amount of its claim less all distributions on account of such Claim." [emphasis in original]*

18. Section 5.2(b) of the Plan provides that any default under a Participant Settlement Note shall constitute a default under the respective defaulting Settling Participant's Participant Settlement Agreement and shall accelerate the amounts due under the Participant Settlement Agreement.

19. Section 5.2(c) of the Plan provides that each Settling Participant consents to the jurisdiction of the Bankruptcy Court and, in the event of default by the Settling Participant, the standing of the Liquidating Trustee to assert a claim for relief against such defaulting Settling Participant under the Plan and §723 of the Bankruptcy Code to seek payment of any deficiency in the partnership's obligations.

20. Lurie's Participant Settlement Agreement provides that he "consents to all the terms and conditions of the Plan, and agrees to satisfy all obligations contained herein and in the Note and the Second Participant Settlement Note . . . ".

21. Paragraph 12 of the Lurie Participant Settlement Agreement provides, in pertinent part:

> *"12. The following events shall constitute Events of Default hereunder (each an "Event of Default"):*
>
> *(a) Participant defaults in the performance of any of his or her obligations under, or fails to satisfy any of the terms or conditions of, this Agreement, the Note or the Second Participant Settlement Note (including without limitation, the obligation to pay when due any principal or interest under the Note or any amount payable under this Agreement);. . . . "*

22. Paragraph 13 of the Lurie Participant Settlement Agreement provides, in pertinent part:

> *"If one or more Events of Default shall occur and continue following fifteen days written notice from the Liquidating Trustee to the Participant (with the exception of the matters covered in*

paragraph 12(d), which shall immediately constitute a Default without any objection having been served by the Participant upon the Liquidating Trustee, then a Default shall exist with respect to the Participant's obligations under this Agreement . . . Upon the occurrence of a Default, the then outstanding principal amount of the Note (and, if applicable, the Second Participant Settlement Note), along with all accrued interest, and all other amounts payable by Participant hereunder and under the Note (and, if applicable, the Second Participant Settlement Note) shall be immediately due and payable without presentment, demand, protest or any formalities of any kind, all of which are expressly waived by Participant. In addition, the releases of the Participant provided for under this Agreement will become null and void (releases given by the defaulting Settling Participants to Released Parties shall remain in full force and effect, except for defensive purposes as described below) and the Liquidating Trustee and the holders of claims will be entitled to enforce all such claims against the Participant, including any unpaid portion of the Participant's First Participant Settlement Note (and, if applicable, the Second Participant Settlement Note) (provided that no creditor shall be allowed to recover more than the amount of its claim less all prior distributions on account of such claim), subject to any claims, counterclaims and/or defenses that Participant may have (such defenses and counterclaims shall be solely for the purpose of offset against the

* * *

United States Bankruptcy Appellate Panel
FOR THE EIGHTH CIRCUIT

No. 00-6091 EM

In re: Popkin & Stern, Debtor.	* * *	
Robert J. Blackwell, Plaintiff-Appellee, v. Nancy Fendell Lurie, Defendant-Appellant.	* * * * * * *	Appeal from the United States Bankruptcy Court for the Eastern District of Missouri

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Submitted: February 6, 2001
Filed: March 19, 2001

Before KOGER, Chief Judge, WILLIAM A. HILL, and SCOTT, Bankruptcy Judges.

WILLIAM A. HILL, Bankruptcy Judge.

Defendant Nancy Fendell Lurie appeals from the bankruptcy court's conclusion that the Rooker-Feldman doctrine effectively bars the bankruptcy court from determining the nature and extent of her ownership interest in certain execution proceeds derived from a sheriff's sale of a painting entitled "Apache Renegades." We have jurisdiction over this appeal from the final order of the

bankruptcy court. *See* 28 U.S.C. § 158(b). For the reasons set forth below, we reverse and remand this case for further proceedings consistent with this opinion.

BACKGROUND

In early 1992, an involuntary chapter 7 bankruptcy petition was filed against the Popkin & Stern law firm. The case was converted to chapter 11 and a trustee, Robert Blackwell ("trustee"), was appointed. A chapter 11 plan was eventually confirmed that provided for the creation of a "liquidating trust," and Blackwell was specified as the liquidating trustee.

Ronald Lurie ("Ronald") was a general managing partner of Popkin & Stern. On October 20, 1994, the liquidating trustee obtained a bankruptcy court judgment against Ronald in the amount of $1,121,743.00. This judgment is often referred to as the "Deficiency Judgment."

The defendant, Nancy Fendell Lurie ("Nancy"), is Ronald's wife. On April 15, 1998, the liquidating trustee obtained a bankruptcy court judgment against Nancy in the amount of $352,300.95 on the basis of several fraudulent transfers she had received from Ronald. In its subsequent order of December 21, 1999, the bankruptcy court clarified the relationship between the judgments against Ronald and Nancy, stating:

> 15. The total amount that the Liquidating Trustee may recover under Ron's Deficiency Judgment is $1,121,743.00 plus interest from the date that the Judgment was entered.

16. As provided under Paragraph 14 of the April 15, 1998 Judgment entered against Nancy Lurie in Adversary No. 94-4461, of the amount that [the] Liquidating Trustee can recover under Ron's Deficiency Judgment, the Liquidating Trustee can recover up to $352,300.95 plus interest under the Judgment entered against Nancy in Adversary No. 94-4461.

* * *

23. If any property owned by the Luries as tenants by the entireties is liquidated under a Writ of Execution, *the full amount of proceeds should be applied to both the Deficiency Judgment and the Judgment entered against Nancy Lurie.* [italics added]

While the trustee's fraudulent transfer action was pending against Nancy, the bankruptcy court entered an order freezing the sale of certain assets, including the painting entitled "Apache Renegades" which was being held by the Trailside Americana art gallery in Scottsdale, Arizona.

On November 18, 1998, the bankruptcy court granted the trustee's application for relief from the freeze order with respect to the "Apache Renegades" painting. The trustee domesticated the bankruptcy court judgments against Ronald and Nancy in the Maricopa County Superior Court for the State of Arizona. He then initiated state court garnishment proceedings for the purpose of executing on the painting, selling it at a sheriff's sale, and applying the proceeds against Ronald's Deficiency Judgment.

On June 30, 1999, the trustee obtained a garnishment judgment which identified Ronald as the Judgment Debtor and contained the following finding as to ownership of the painting at issue: "[t]he property held by Garnishee is non-exempt personal property of the Judgment Debtor and is subject to garnishment and execution." On October 4, 1999, the trustee obtained a similar garnishment judgment against Nancy which contained a finding identical to the one set forth above except that it named Nancy as the owner of the painting. Both garnishment judgments ordered the Clerk of Court for the Maricopa County Superior Court to issue Writs of Special Execution directing the sheriff to seize and sell the painting at issue. However, the garnishment judgments were silent as to how the proceeds of that sale were to be allocated between the bankruptcy court judgments against Ronald and Nancy.

On October 21, 1999, the Clerk of Court for the Maricopa County Superior Court issued a Writ of Special Execution based on the June 30, 1999, garnishment judgment referencing Ronald's Deficiency Judgment. The writ was drafted by the trustee's attorneys and signed by the Clerk of Court. It directed the sheriff to seize the "Apache Renegades" painting, sell it, and apply the proceeds to reduce the outstanding balance of Ronald's Deficiency Judgment. However, the writ was silent as to whether any of the proceeds should also be applied in partial satisfaction of the fraudulent transfer judgment against Nancy. The record before us does not reflect whether the Clerk of Court issued a similar Writ of Special Execution based on the October 4, 1999, garnishment judgment.

After the Maricopa County sheriff levied on the painting in early November 1999, Nancy received a Sheriff's Notice of Sale of Personal Property on Execution ("Notice of Sale") which stated that the painting would be sold at a sheriff's sale on December 2, 1999, in partial satisfaction of the Deficiency Judgment against Ronald. The Notice of Sale was silent as to whether any of the proceeds would be applied to the fraudulent transfer judgment against Nancy. Nancy responded by moving the bankruptcy court for a stay of execution, specifically claiming an ownership interest in the painting at issue. Nancy's motion for a stay of execution was denied, and the painting was sold at a sheriff's sale on January 13, 2000. The sheriff's Return of Sale of Personal Property Under Execution ("Return of Sale") suggested that the execution proceeds would be applied in partial satisfaction of Ronald's Deficiency Judgment. The Return of Sale was silent as to whether any portion of the execution proceeds might also be applied to the judgment against Nancy.

On March 10, 2000, the trustee moved the bankruptcy court for a determination as to the various ownership interests in the execution proceeds of the "Apache Renegades" painting. Subsequently, the trustee moved the bankruptcy court for an order allowing him to distribute 12.6 percent ($25,585.00) of the execution proceeds to Ronald's brother, Robert Lurie, on the basis of Robert's claimed ownership interest in the painting. By order dated April 12, 2000, the bankruptcy court granted the trustee's motion for partial distribution.

A hearing regarding the trustee's March 10, 2000, motion to determine ownership of the remaining execution proceeds was held on April 26, 2000. On May 5, 2000, the bankruptcy court issued an order determining that neither

Ronald nor Nancy had an ownership interest in the execution proceeds. The trustee then filed a motion for reconsideration which was granted on May 23, 2000. The bankruptcy court vacated its order of May 5, 2000, and granted the trustee leave to file a new motion to determine ownership of the execution proceeds. On June 12, 2000, however, the trustee withdrew his prior motion for such a determination.

On June 21, 2000, the trustee filed a Partial Satisfaction of Judgment with the Maricopa County Superior Court. The Partial Satisfaction of Judgment was prepared by the trustee's attorneys and acknowledged that according to the garnishee-defendant, Trailside Americana art gallery, Nancy had an ownership interest in the painting that was sold. Nevertheless, the Partial Satisfaction of Judgment advised the Arizona court that none of the execution proceeds had been applied to reduce the outstanding balance of the fraudulent transfer judgment against Nancy. Specifically, the Partial Satisfaction of Judgment stated that "[o]ne hundred percent (100%) of the net proceeds of the sale of the asset in Maricopa County were consumed in partially satisfying [the Deficiency Judgment against Ronald] and, therefore, no excess proceeds were available to be applied to [the fraudulent transfer judgment against Nancy]."

On June 27, 2000, Nancy filed her own motion with the bankruptcy court to determine ownership of the execution proceeds. A hearing was conducted on July 14, 2000, and the bankruptcy court issued an order dated July 26, 2000, detailing its ruling. The bankruptcy court found that the sheriff had sold the painting under Ronald's Deficiency Judgment and that he had applied the proceeds of the sale to that judgment. The bankruptcy court then

concluded that the Rooker-Feldman doctrine precluded Nancy from "trying to relitigate the Arizona Superior Court Judgment and/or the issue of the application of the [execution] proceeds." Alternatively, the bankruptcy court concluded that full faith and credit, collateral estoppel, or judicial estoppel precluded Nancy from litigating in bankruptcy court the issue of whether any execution proceeds should be applied in partial satisfaction of the fraudulent transfer judgment against her.

On August 7, 2000, Nancy filed a motion to set aside the bankruptcy court's order of July 26, 2000, arguing that the Rooker-Feldman doctrine had no bearing on the issue of whether the execution proceeds should be applied to partially satisfy the fraudulent transfer judgment against her. By order dated August 8, 2000, the bankruptcy court denied Nancy's motion. Nancy appeals from that denial, asserting that the bankruptcy court erred in concluding that the Rooker-Feldman doctrine prohibited the application of execution proceeds against her fraudulent transfer judgment. She further contends that she is entitled to equitable relief pursuant to 11 U.S.C. § 105(a). The liquidating trustee argues that the bankruptcy court properly applied the Rooker-Feldman doctrine, that the bankruptcy court's decision should be affirmed, and that Nancy is not entitled to any equitable relief under section 105(a) of the Bankruptcy Code.

STANDARD OF REVIEW

On appeal, we review the bankruptcy court's findings of fact for clear error and its conclusions of law *de novo.* Fed. R. Bankr. P. 8013; *Hatcher v. U.S. Trustee (In re Hatcher),* 218 B.R. 441, 445 (B.A.P. 8th Cir. 1998)

(citations omitted); *Gourley v. Usery (In re Usery),* 123 F.3d 1089, 1093 (8th Cir. 1997); *O'Neal v. Southwest Mo. Bank (In re Broadview Lumber Co.),* 118 F.3d 1246, 1250 (8th Cir. 1997).

DISCUSSION

The liquidating trustee argues that the Rooker-Feldman doctrine precludes the bankruptcy court from entertaining Nancy's motion for a determination as to whether the execution proceeds should be applied in partial satisfaction of her fraudulent transfer judgment. In *Ferren v. Searcy Winnelson Co. (In re Ferren),* 227 B.R. 279 (B.A.P. 8th Cir. 1998), we summarized the tenets of the Rooker-Feldman doctrine as follows:

> Initially, we note that preclusion, upon which the bankruptcy court relied, and the Rooker-Feldman doctrine "are closely related legal concepts." *Goetzman v. Agribank, FCB (In re Goetzman),* 91 F.3d 1173, 1177 (8th Cir.), cert. denied, 519 U.S. 1042, 117 S.Ct. 612, 136 L.Ed.2d 537 (1996); *see Charchenko v. City of Stillwater,* 47 F.3d 981, 983 n. 1 (8th Cir. 1995). The Rooker-Feldman doctrine "derives from the prohibition on federal appellate review of state court proceedings." *Bechtold v. City of Rosemount,* 104 F.3d 1062, 1065 (8th Cir. 1997); *see Hatcher v. U.S. Trustee (In re Hatcher),* 218 B.R. 441, 447 (8th Cir. BAP 1998) (quoting same). Under the doctrine, lower federal courts lack subject matter jurisdiction over challenges to determinations made by state courts in judicial proceedings. *See Snider v. City of Excelsior Springs,* 154 F.3d 809, 811 (8th Cir. 1998); *Neal v. Wilson,* 112 F.3d 351, 356 (8th Cir. 1997). Instead, review of state court decisions lies

> exclusively in the United States Supreme Court. *See First Commercial Trust Co. v. Colt's Mfg. Co.*, 77 F.3d 1081, 1083 (8th Cir. 1996); *Postma v. First Fed. Sav. & Loan*, 74 F.3d 160, 162 (8th Cir. 1996).
>
> Impermissible appellate review occurs in the lower federal courts whenever they entertain claims which are inextricably intertwined with those addressed in the state court. *Snider*, 154 F.3d at 811; *In re Goetzman*, 91 F.3d at 1177. Claims are inextricably intertwined "if the relief requested in the federal action would effectively reverse the state court decision or void its ruling." *Bechtold*, 104 F.3d at 1065; *Charchenko*, 47 F.3d at 983. Thus, in other words, the Rooker-Feldman doctrine precludes a federal action "if the federal challenge succeeds only to the extent that the state court wrongly decided the issues before it." *Keene Corp. v. Cass*, 908 F.2d 293, 296 (8th Cir. 1990) (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25, 107 S.Ct. 1519, 1533, 95 L.Ed.2d 1 (1987) (Marshall, J., concurring)); *Postma*, 74 F.3d at 162 (quoting same).

Ferren, 227 B.R. at 282-83 (footnotes omitted); *see also Hatcher v. U.S. Trustee (In re Hatcher)*, 218 B.R. 441, 447-48 (B.A.P. 8th Cir. 1998). As in *Ferren*, we must determine what the state court held and whether the relief Nancy sought in bankruptcy court would have voided the state court's decision or required a determination that the state court had erred. *Ferren*, 227 B.R. at 283 (citing *Snider v. City of Excelsior Springs*, 154 F.3d 809, 811 (8th Cir. 1998)).

We begin by analyzing the relevant holdings of the state court judgments at issue. In this case, the trustee obtained two garnishment judgments from the Maricopa

County Superior Court for the State of Arizona. One judgment contained a finding that Ronald owned the "Apache Renegades" painting. The other judgment contained an identical finding that Nancy owned the aforementioned painting. These findings suggest that both Ronald and Nancy had ownership interests in the painting. Moreover, the garnishment judgments at issue are silent as to how the execution proceeds from the sale of the subject painting were to be applied in satisfaction of the respective bankruptcy court judgments against Ronald and Nancy.

We must next determine whether the relief Nancy sought in bankruptcy court would have voided a state court decision or would have required a determination that the state court had erred. In her motions of June 27, 2000, and August 7, 2000, Nancy sought to have the execution proceeds from the "Apache Renegades" painting applied in partial satisfaction of the fraudulent transfer judgment against her. The relief Nancy requested was consistent with the October 4, 1999, state court garnishment judgment which specifically stated that she had an ownership interest in the painting at issue. Given that neither of the state court garnishment judgments indicated how the execution proceeds were to be apportioned between the respective bankruptcy court judgments against Ronald and Nancy, we fail to see how the relief Nancy requested would have voided the state court garnishment judgments or required a determination that the state court had erred.

Given the inter-related nature of the bankruptcy court judgments against Ronald and Nancy, application of the execution proceeds against Ronald's Deficiency Judgment did not foreclose the possibility that all or a portion of

those same proceeds should have been applied to the fraudulent transfer judgment against Nancy as well. This possibility was expressly contemplated by the bankruptcy court's order of December 21, 1999, and the trustee had knowledge of this order well before the painting was sold and well before he filed the June 21, 2000, Partial Satisfaction of Judgment with the Arizona state court. Although the June 21, 2000, Partial Satisfaction of Judgment indicates that none of the proceeds would be applied to the fraudulent transfer judgment against Nancy, that document was prepared solely by the trustee and his attorneys. Therefore, it does not represent a judicial determination and reflects only the conclusion of the trustee. As there has been no judicial determination by the Arizona state court prohibiting application of the execution proceeds to the fraudulent transfer judgment against Nancy, we conclude that the relief Nancy requested from the bankruptcy court was not inextricably intertwined with any decision of the Arizona state court. Accordingly, the bankruptcy court erred in ruling that the Rooker-Feldman doctrine barred it from determining the extent to which the execution proceeds at issue should be applied to Nancy's fraudulent transfer judgment.

Although the trustee has briefly argued that the bankruptcy court's decision might also be upheld on the basis of collateral estoppel, judicial estoppel, and 28 U.S.C. § 1738 (the Full Faith and Credit statute), our examination of the record leads us to conclude that these arguments have no merit. The Arizona state court has never passed on the issue of whether the execution proceeds should be applied to Nancy's fraudulent transfer judgment. Therefore, 28 U.S.C. § 1738 and collateral estoppel are inapplicable. *See generally Fischer v. Scarborough*

(In re Scarborough), 171 F.3d 638, 641 (8th Cir. 1999); *Lommen v. City of East Grand Forks,* 97 F.3d 272, 274 (8th Cir. 1996). Similarly, judicial estoppel is inapplicable because both Nancy and the trustee have consistently maintained that Nancy had an ownership interest in the painting and its proceeds. *See Hossaini v. Western Missouri Medical Center,* 140 F.3d 1140, 1142-43 (8th Cir. 1998).

CONCLUSION

Having determined that the Rooker-Feldman doctrine does not bar the bankruptcy court from determining the extent to which the execution proceeds from the "Apache Renegades" painting should be applied to Nancy's fraudulent transfer judgment, we need not address Nancy's contention that she is entitled to equitable relief under 11 U.S.C. § 105(a). We reverse and remand this case for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. BANKRUPTCY APPELLATE PANEL, EIGHTH CIRCUIT.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re:	)	Chapter 11
POPKIN & STERN,	)	Case No. 92-42218-293
Debtor.	)	

ORDER CONFIRMING DEBTOR'S SECOND AMENDED PLAN OF REORGANIZATION

At St. Louis, in this District, this 27th day of August, 1993.

This matter comes before the Court for the hearing on confirmation of the Debtor's Second Amended Plan of Reorganization (the "Plan").[1] The Plan has been transmitted to creditors and equity security holders after approval of the Third Amended Disclosure Statement and the Debtor has given notice of the hearing to consider confirmation of the Plan in accordance with the Bankruptcy Code (the "Code") and Bankruptcy Rules, and such hearing on confirmation was held on August 27, 1993, at St. Louis, Missouri. Objections to the Plan have been filed by First Bank, Donald Rosenfeld, Royal Bank, Old Republic Insurance Company and 8182 Maryland Avenue Associates. The Debtor has filed a Report of Balloting, and certain creditors have amended their ballots. Based upon the evidence adduced and the record as a whole, the Court

[1] Capitalized terms used in this order have the meaning described in the Plan.

makes the following combined findings of fact and conclusions of law:

* * *

12. The aggregate amounts of all the deposits, cash payments or cash equivalents on account of the Participant Settlement Agreements and Participant Settlement Notes delivered to the Liquidating Trustee equals the required $2,600,000 (inclusive of the $36,000 value of the concessions offered by counsel for the Debtor and the Liquidating Trustee in connection with their Class 1 claims).

13. Each Settling Participant has delivered to the Liquidating Trustee a Participant Settlement Agreement and the other documents required pursuant to such Participant Settlement Agreement, the Initial Payment, a First and Second Participant Settlement Note (if appropriate) cumulatively providing for payment in full, including interest (if applicable) of the respective Settling Participant's Participant Amount.

14. The form of the Liquidating Trust Agreement, the Participant Settlement Agreements, the Participant Settlement Notes and all related documentation is appropriate and such documents are approved.

15. Old Republic Insurance Company, First Bank[, Donald Rosenfeld, Royal Bank /s/ KMS] and 8182 Maryland Avenue Associates have requested and are hereby granted leave to withdraw their objections to confirmation.

16. Alan Popkin has timely accepted his designation as Tax Matters Partner.

17. 8182 Maryland Avenue Associates is entitled to and is hereby granted a Class 1 claim in the amount of $176,600.41 in connection with the Debtor's post-petition use and occupation of the premises at 8182 Maryland Avenue, a Class 1 claim in the amount of $88,787.21 arising under Section 507(a)(2) and Section 502(f) for use in occupation of the 8182 Maryland Avenue premises, and a Class 6 claim in the amount of $1,728,512.35 arising in connection with the rejection of the lease for the premises at 8182 Maryland Avenue.

18. The Debtor does not have any obligations for payment of retiree benefits, as that term is defined in Section 1114 of Title 11, and accordingly, the requirements of Section 1129(a)(13) are inapplicable.

19. The following clarifications and/or modifications (hereinafter referred to as modifications) to the Plan proposed by the Debtor at the hearing on confirmation are appropriate and meet the requirements of Section 1127. The modifications do not modify the Plan to the extent that the Plan as modified fails to the [sic] meet the requirements of Section 1122 and 1123 of the Code, nor are the modifications such that any holder of any claim that has previously accepted the Plan would be likely to consider changing such acceptance as a result of the modifications. Accordingly, no further disclosure or solicitation of acceptances is required in connection with the modification:

> (a) Notwithstanding any language in the Plan or this Order regarding releases, no claim of any insurer of the Debtor or of a former partner in the Debtor against another insurer of the Debtor or of a former partner in the Debtor is released or enjoined under the Plan, and

* * *

2. The Injunction shall not apply to any Unrelated Claims.

3. The Injunction shall not apply to any Claims against any Non-Settling Participant or any Defaulting Settling Participant.

4. The entry of an order for relief under the Bankruptcy Code by or against a Settling Participant shall automatically terminate the Injunction solely as to that Settling Participant to the extent that such Injunction would prohibit any action against such Participant or Participant's bankruptcy estate.

C. The Chapter 11 Trustee and the Liquidating Trustee are hereby authorized to take actions necessary to consummate the Plan and to execute all documents required under the Plan.

D. The Court shall retain jurisdiction of this case pursuant to the provisions of the Plan. Old Republic Insurance Company has objected to the Plan in connection with the post-confirmation jurisdiction of this Court for coverage issues regarding malpractice claims against the Debtor. Old Republic Insurance Company's withdrawal of its objection based on jurisdictional issues shall not affect or limit in any way Old Republic Insurance Company's jurisdiction objections and arguments in Adversary Proceeding No. 92-4305 pending before this Court, and all parties in that adversary proceeding reserve the right to assert all arguments regarding the jurisdictional issues in

dispute in that adversary proceeding notwithstanding this Order.

/s/ Karen M. See
Karen M. See
United States
Bankruptcy Judge

[cc: Keith
for service
/s/ KMS]

PARTICIPANT SETTLEMENT AGREEMENT

This Participant Settlement Agreement (the "Agreement") is entered into by and between RONALD U. LURIE ("Participant") and Robert J. Blackwell, in his capacity as the Trustee of the Popkin & Stern Liquidating Trust (the "Liquidating Trustee").

This Agreement, which has been executed by Participant and delivered to the Liquidating Trustee to be held in escrow pending confirmation of the Chapter 11 Plan of Reorganization (the "Plan") for Popkin & Stern, the Debtor in Case No. 92-42218-293, pending before the United States Bankruptcy Court for the Eastern District of Missouri, is the Participant Settlement Agreement contemplated under the Plan. The Agreement and the First Participant Settlement Note (the "Note") (and, if applicable, the Second Participant Settlement Note) are entered into in accordance with and pursuant to the terms and requirements of the Plan.

Accordingly, the Participant and the Liquidating Trustee, intending to be legally bound, hereby agree as follows:

1. All capitalized terms not defined in this Agreement shall have the meaning assigned to them in the Plan.

2. In satisfaction of all claims of the Debtor and holders of Claims against Participant (other than obligations: (i) under this Agreement; (ii) under the Note (and, if applicable, the Second Participant Settlement Note); or (iii) relating to any Unrelated Claim), Participant shall: (a) execute and deliver this Agreement; (b) execute and

deliver the Note (and, if applicable, the Second Participant Settlement Note); and (c) deliver cash or a letter of credit in the amount of the Initial Payment to the Liquidating Trustee, all to be held in escrow by the Liquidating Trustee pursuant to the terms and conditions of the Plan. Participant hereby consents to all of the terms and conditions of the Plan, and agrees to satisfy all obligations contained herein and in the Note and the Second Participant Settlement Note, subject to the confirmation of the Plan and the issuance of the Injunction.

3. The Participant Settlement Amount of Participant shall be: (a) $ 35,000.00 as the Initial Payment; (b) $ 315,000.00 (under the terms of the First Participant Settlement Note); plus (c) $ 11,704.00 (under the terms of the Second Participant Settlement Note) for an aggregate amount of $ 361,704.

4. Contemporaneously with the execution and delivery to the Liquidating Trustee of this Agreement to be held in escrow, Participant shall and hereby does deliver to the Liquidating Trustee his or her First Participant Settlement Note in the amount of $ 315,000.00, representing the portion of the Participant Settlement Amount to be paid through deferred payments (and, if applicable, the amount of the Second Participant Settlement Note shall be $ 11,704.00).

5. Participant may prepay the principal amount of the Note (and, if applicable, the Second Participant Settlement Note) at any time in whole or in part without discount or premium. Interest on the prepaid principal, accrued through and including the prepayment date, shall be paid on the prepayment date.

6. Contemporaneously with the execution and delivery to the Liquidating Trustee of this Agreement to be held in escrow, Participant shall and hereby does deliver to the Liquidating Trustee an Initial Payment in the amount of $ 35,000.00. This Initial Payment shall be held in escrow pending satisfaction of the above described conditions for Participant's obligations under this Agreement.

7. All payments of principal, interest and other amounts to be made by Participant hereunder and under the Note (and, if applicable, the Second Participant Settlement Note) shall be made without deduction, setoff or counterclaim to the Liquidating Trustee at 1010 Market Street, Suite 1440, St. Louis, Missouri 63101 (or such other location as the Liquidating Trustee may designate) on the date on which such payment shall be due and payable.

8. Consistent with the terms and conditions set forth in the Plan, the Participant hereby fully and irrevocably releases all of the Released Parties from any and all Claims (other than any Unrelated Claims) and assigns to the Liquidating Trustee any and all Claims (other that [sic] any Unrelated Claim) that Participant may have against any Non-Settling Participant. Participant hereby agrees not to bring any proceeding of any kind against any Released Party (other than in connection with any Unrelated Claim).

9. Subject to the provisions of this Agreement, the Debtor, the holders of Claims and the Liquidating Trustee hereby release Participant, in his or her capacity as a Participant, of any and all Claims (other than obligations under this Agreement, under the Note (and, if applicable,

the Second Participant Settlement Note) or relating to any Unrelated Claims) contingent upon compliance by Participant with the terms of this Agreement and the Note (and, if applicable, the Second Participant Settlement Note). If a Default (as hereinafter defined) shall occur under this Agreement, the release provided to Participant herein and in the Plan will automatically become null and void (releases given by the defaulting Settling Participants to Released Parties shall remain in full force and effect, except for defensive purposes as described below) and the Liquidating Trustee and the holders of Allowed Claims will be entitled to enforce all Claims against the Defaulting Participant, subject to any defenses, claims and counterclaims (such defenses and counterclaims shall be solely for the purpose of offset against the defaulting Settling Participant's liability and for no other purpose, including any affirmative recovery against any Released Party) that such Participant may have to such Claims. In the event that Participant has not breached any provision of the Plan, this Agreement or the Note, neither the Trustee, any other Participant nor the holder of any Claim shall bring any further proceeding of any kind in any form against Participant (other than a proceeding in respect of any Unrelated Claim). Upon payment in full of the Participant Settlement Amount (including, if applicable, the amount due under the Second Participant Settlement Note), this release shall become absolute.

10. Participant shall reasonably cooperate with the Liquidating Trustee and its representatives in collecting and realizing the maximum value of all property in which the Debtor or the Liquidating Trustee may have an interest, including without limitation, the Debtor's accounts

receivable (including contingent fee cases). Such cooperation shall include, without limitation, providing information available to the Participant and such assistance as the Liquidating Trustee may reasonably require in collecting accounts receivable or objecting to any Claim against the Debtor and providing such other reasonable assistance as the Liquidating Trustee may request. Participant's obligations under this paragraph shall survive the full payment of the Participant Settlement Amount.

11. Effective as of October 1, 1992 and except to the extent provided to the contrary in Paragraph 13 of this Agreement and Article V of the Plan, Participant waives, to the fullest extent permitted by law, any defense or objection, in either case based upon any applicable statute of limitations, time bar, laches or other analogous statue, law or legal principle, he or she may now or hereafter have to any legal proceeding pending or to be brought by the Liquidating Trustee or the holder of any Claim against Participant arising out of or related to the business and financial affairs of the Debtor following a Default (as defined below) by the Participant. Except to the extent waived in this Paragraph, Participant reserves any and all defenses to and claims with respect to any Claim asserted against the Participant arising out of or relating to the business and financial affairs of the Debtor.

12. The following events shall constitute Events of Default hereunder (each an "Event of Default"):

(a) Participant defaults in the performance of any of his or her obligations under, or fails to satisfy any of the terms or conditions of, this Agreement, the Note or the Second Participant Settlement Note (including without limitation, the obligation to pay when

due any principal or interest under the Note or any amount payable under this Agreement);

(b) Prior to the full payment of the Participant Settlement Amount, Participant applies for or consents to the appointment of, or the taking of possession by a receiver, custodian, trustee or liquidator of all or a substantial part of his or her assets as a result of the insolvency or adverse financial condition of Participant;

(c) Prior to the full payment of the Participant Settlement Amount, Participant makes a general assignment for the benefit of his or her creditors;

(d) Prior to the full payment of the Participant Settlement Amount, an order for relief against Participant is entered in connection with a case under the Bankruptcy Code or similar law; and

(e) The Bankruptcy Court, after notice and opportunity for hearing, determines that Participant has breached his or her obligation of cooperation contained in Paragraph 10 of this Agreement.

13. If one or more Events of Default shall occur and continue following fifteen days written notice from the Liquidating Trustee to the Participant (with the exception of the matters covered in Paragraph 12(d), which shall immediately constitute a Default) without any objection having been served by the Participant upon the Liquidating Trustee, then a Default shall exist with respect to the Participant's obligations under this Agreement. In the event that an objection to the existence of an Event of Default is delivered by the Participant to the Liquidating Trustee, the Bankruptcy Court shall hold a hearing to determine the existence of one or more events of Default and/or a Default under this Agreement. Such hearing shall

be conducted as a contested matter as provided in the Bankruptcy Rules and Section 1109 of the Bankruptcy Code. Upon the occurrence of a Default, the then outstanding principal amount of the Note (and, if applicable, the Second Participant Settlement Note), along with all accrued interest, and all other amounts payable by Participant hereunder and under the Note (and, if applicable, the Second Participant Settlement Note) shall be immediately due and payable without presentment, demand, protest or any formalities of any kind, all of which are expressly waived by Participant. In addition, the releases of the Participant provided for under this Agreement will become null and void (releases given by the defaulting Settling Participants to Released Parties shall remain in full force and effect, except for defensive purposes as described below) and the Liquidating Trustee and the holders of claims will be entitled to enforce all such claims against the Participant, including any unpaid portion of the Participant's First Participant Settlement Note (and, if applicable, the Second Participant Settlement Note) (provided that no creditor shall be allowed to recover more than the amount of its claim less all prior distributions on account of such claim), subject to any claims, counterclaims and/or defenses that Participant may have (such defenses and counterclaims shall be solely for the purpose of offset against the defaulting Settling Participant's liability and for no other purpose, including any affirmative recovery against any Released Party).

14. No Default by any other settling participant shall effect the releases afforded this Participant under this Agreement or the Plan.

15. All notices and other communications provided for herein or in the Note shall be given by first class mail,

return receipt requested, to the intended recipient at the following addresses:

To the Liquidating Trustee:

Robert J. Blackwell
1010 Market Street, Suite 1440
St. Louis, Missouri 63101

To the Participant:

Ronald U. Lurie
#1 Deacon Drive
St. Louis, MO 63131

To any party in interest in the Popkin & Stern case requesting notice of post-confirmation hearings:

At the address set forth in such request,

or to such other address as shall be designated by such party in written notice to the other party or parties. All notices shall be deemed to have been given upon three days following the date on which the notice was mailed, or in the event of hand delivery, on the date on which the notice is delivered.

16. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective estates, successors and assigns.

17. No change or modifications to this Agreement may be made orally. Any amendment must be in writing signed by the parties hereto, and must be approved by the Bankruptcy Court.

18. This Agreement shall be governed by and construed in accordance with the laws of the State of Missouri. Participant hereby submits to the jurisdiction of the

United States Bankruptcy Court for the Eastern District of Missouri for purposes of legal proceedings arising out of or relating to this Agreement, the Plan, the Note, the Second Participant Settlement Note or the transactions contemplated herein.

19. If the Plan is not confirmed by the Court, nothing contained in or related to the Plan, this Agreement, the Note or the Second Participant Settlement Note may be used in any manner by any party in any action, suit or proceeding relating to Participant's liability to the Debtor or the holder of any Claim. The parties acknowledge and agree that the undertakings and agreement contained in this Participant Settlement Agreement, the Note and the Second Participant Settlement Note have been agreed to solely for the purpose of effectuating a voluntary settlement of disputes relating to Participant's liability to the Debtor and holders of Claims and shall not be deemed to constitute an admission or concession by any of them for any purpose. Nor shall such undertakings and agreements, or this Agreement, the Note or the Second Participant Settlement Note be deemed to constitute a waiver of any legal position that any party might otherwise assert in any context. The provisions of this paragraph shall survive the termination of this Agreement.

20. This Agreement, the Plan, and the Note (and, if applicable, the Second Participant Settlement Note) constitute the entire agreement between the parties, and all earlier agreements, representations and discussions shall be of no further effect, but shall instead be deemed merged herein. In the event of any inconsistency or

conflict between the terms of this Agreement and the Plan, the terms of the Plan shall control.

PARTICIPANT

/s/ Ronald U. Lurie

LIQUIDATING TRUSTEE

/s/ Robert J. Blackwell Liquidating Trust
Robert J. Blackwell, Trustee of the
Popkin & Stern Liquidating Trust

STATE OF MISSOURI)
City) SS
~~COUNTY~~ OF _____)

On August 12, 1993 before me appeared Ronald U. Lurie to me known to be the person described in and who executed the foregoing Participant Settlement Agreement and acknowledged to me that he/she executed the same as his/her free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State aforesaid, the day and year first above written.

/s/ Stacia Sanders
Notary Public

My Commission Expires:

STACIA SANDERS
NOTARY PUBLIC,
STATE OF MISSOURI
[ILLEGIBLE] COUNTY
MY COMMISSION EXP.
DEC. [ILLEGIBLE]